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Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
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RECENT DEVELOPMENTS . . . A Summary

Education

PRIVATE SCHOOLS: A municipal agency, acting in its official capacity as trustee of a privately-created trust and administering the affairs of a school financed by the proceeds of such trust, is subject to the requirements of the Fourteenth Amendment prohibiting discrimination in admission to the school on the basis of race. This is the holding of the United States Supreme Court in the "Girard College Case" (p. 591) arising in *Pennsylvania*. The school, in operation over a century, is supported by funds left in trust by Stephen Girard for the education of "poor white male orphans," the trust being administered by the Board of Directors of City Trusts of Philadelphia. Negro children applied for and were denied admission to the school because they were not "white." Previously lower state courts and the Pennsylvania Supreme Court had found no "state action" involved.

PUBLIC SCHOOLS: The decision of a federal district court allowing a period of approximately six years for the completion of integration of public schools in Little Rock, *Arkansas*, has been affirmed by the Court of Appeals for the Eighth Circuit (p. 593). Immediate integration was ordered, however, by a federal district court in a case involving schools in Scott County, *Kentucky* (p. 597). In *Maryland* the state Court of Appeals has rejected a contention made by opponents of school integration that the Fourteenth Amendment was never legally adopted (p. 597).

A "Pupil Placement Act" has been adopted by *Texas* (p. 693) as well as an act providing for local option elections to determine whether dual school systems would be operated (p. 695). A resolution prohibiting the participation by students in interracial activities connected with schools was passed by the *Georgia* State Board of Education (p. 715).

SCHOOL FUNDS: The Attorney General of *Delaware* issued an opinion concerning the bases of school taxes as affected by racial integration of the schools (p. 743). In *Virginia* the Attorney General has stated that school funds may be validly expended for the construction of school facilities designed for segregated use (p. 745).

COLLEGES AND UNIVERSITIES: The Fourteenth Amendment to the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination" a federal district court in *Louisiana* has declared in ruling against the constitutional validity of two Louisiana acts (p. 600). The acts (1) required a certificate of good moral character signed by school officials to be presented by applicants for admission to state colleges and universities in Louisiana; and (2) provided that school officials might be dismissed for "performing any act toward bringing about integration of the races in the public school system or any public institution of higher learning."

Golf Courses

In separate actions in federal district courts involving golf courses in Miami, *Florida* (p. 603), Greensboro, *North Carolina* (p. 605), and Portsmouth, *Virginia* (p. 609), injunctions have been granted requiring the admission of Negroes to the golf courses on the same basis as white persons. The *North Carolina* case also involved the validity of a lease, by the city, of the golf course to a private operator. The court there held that the lessee could not lawfully discriminate against Negroes in the use of the course.

Housing

Public housing facilities in Benton Harbor, *Michigan*, have been required, by a federal court order, to be opened to Negroes on the same basis as for white persons (p. 611). Alleged discrimination in the sale of privately-constructed housing in *Pennsylvania* was raised in a contested application for a construction permit for a radio station before the Federal Communications Commission (p. 715). In *Oregon* the Attorney General has expressed doubts as to the con-

stitutionality of proposed legislation to prohibit discrimination in housing "benefiting from public aid" (p. 746).

Family Relations

A statute in *Maryland* which punished the conception of a child by a white woman where the father was a Negro was ruled invalid by a state court (p. 676). *Colorado* has repealed its miscegenation law (p. 707). A recent decision of the *Tennessee* Supreme Court involves the validity of Negro slave marriages (p. 658). In *Massachusetts* a woman successfully brought suit to have the racial designation of "colored" on her marriage license changed to "white" (p. 667); but a suit to require a similar change of designation on a death certificate in *Louisiana* was not successful (p. 669).

Employment

Instances of alleged racial discrimination in employment arose in *New York* (p. 627) and *Minnesota* (p. 625). In *Wisconsin* (p. 648) the state Supreme Court held that proceedings under that state's "Fair Employment Statute" were not judicially enforceable so as to require a labor union to admit Negroes. Railway labor cases involving charges of discrimination were treated by a *federal* district court in *Georgia* (p. 640) and by the Court of Appeals for the Fifth Circuit (p. 643). *Colorado* has amended its Anti-discrimination Act (p. 697).

Public Accommodations

Money damages under the state's Public Accommodation Law were awarded a Negro plaintiff in the state of *Washington* against the operators of a beauty salon who refused to serve her (p. 618). There have been proposals to enact such a law in *Great Britain* (p. 696). The *New York* Court of Appeals has affirmed an order of a lower court requiring the proprietors of a beach club which claimed to be "private" to admit persons without discrimination on the basis of race (p. 620).

Other Developments

A permanent injunction restraining certain activities of the NAACP has been issued by a *Texas* state court (p. 678). The report of an investigation of acts of violence connected with the Koinonia Farms near Americus, *Georgia*, is contained in grand jury presentments filed in that state (p. 682). A resolution of interposition has been adopted in *Florida* (p. 707). Reports of official agencies concerned with various aspects of race relations in *Massachusetts* (p. 725), *Maryland* (p. 734) and *New York* (p. 738) are extracted in this issue.

Reference

A background study dealing with "The Eleventh Amendment" is contained in this issue (p. 757). It is the second of a series of studies on the general topic of limitations on federal judicial power. Cumulative Table of Cases, Volume 2, (p. 767).

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REFERENCE

UNITED STATES SUPREME COURT

EDUCATION
Private Schools—Pennsylvania

Commonwealth of PENNSYLVANIA et al. v. BOARD OF DIRECTORS OF CITY TRUSTS of the City of Philadelphia [In Re Estate of Stephen Girard]

United States Supreme Court, April 29, 1957, No. 769, _____U.S._____, 77 S.Ct. 806, 25 L.W. 3316.

SUMMARY: The will of Stephen Girard, who died in 1831, established a trust for the education of "poor white male orphans." The trust is administered now by a Board of City Trusts, consisting in part of elected officials of the City of Philadelphia and members appointed by the judges of courts of common pleas of the county. An eight-year-old Negro boy applied for admission to Girard College. His application was refused because he was not "white." Together with other rejected Negro applicants, he filed a petition in the Orphan's Court of Philadelphia County, claiming the limitation to "white" persons was invalid and seeking a review of the denial of his admission. That court denied the application, holding that the operation of Girard College by the Board of City Trusts pursuant to terms of the will is not "state action" under the Fourteenth Amendment to the United States Constitution (see 1 Race Rel. L. Rep. 613) and that the decision in the *School Segregation Cases* is not applicable since the College is not a public institution. 1 Race Rel. L. Rep. 325 (1955). The full bench of the Orphan's Court of Philadelphia County affirmed. 4 D. & C. 2d 671, 1 Race Rel. L. Rep. 340 (1956). The Pennsylvania Supreme Court, one justice dissenting, upheld the decision of the Orphan's Court denying the petition for admission, stating that the activity of public officials in administering the trust is not to be construed as "state action." 386 Pa. 548, 127 A.2d 287, 2 Race Rel. L. Rep. 68 (1956). The United States Supreme Court dismissed the appeal but treated the appeal as a petition for writ of certiorari, and reversed and remanded the case for further proceedings not inconsistent with its opinion. The per curiam opinion of the Supreme Court states that the "Board which operates Girard College is an agency of the State of Pennsylvania [and] . . . its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the state [which is] . . . forbidden by the Fourteenth Amendment."

PER CURIAM.

The motion to dismiss the appeal for want of jurisdiction is granted. 28 U.S.C. § 1257 (2). Treating the papers whereon the appeal was taken as a petition for writ of certiorari, 28 U.S.C. § 2103, the petition is granted. 28 U.S.C. § 1257(3). Stephen Girard, by a will probated in 1831, left a fund in trust for the erection, maintenance, and operation of a "college." The will provided that the college was to admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain." The will named as trustee the City of Philadelphia. The provisions of the will were carried out by the State and city and the college was opened in 1848. Since 1869, by virtue of an act of the Pennsylvania Legislature, the trust has been administered and the college operated by the "Board of Directors of City Trusts of the City of Philadelphia." Pa. Laws 1869, No. 1276; Purdon's Pa. Stat. Ann., 1957, Tit. 53, Sec. 1365.

In February 1954, the petitioners Foust and Felder applied for admission to the college. They met all qualifications except that they were Negroes. For this reason the Board refused to admit them. They petitioned the Orphan's Court of Philadelphia County for an order directing the Board to admit them, alleging that their

exclusion because of race violated the Fourteenth Amendment to the Constitution. The State of Pennsylvania and the City of Philadelphia joined in the suit also contending the Board's action violated the Fourteenth Amendment. The Orphan's Court rejected the constitutional contention and refused to order the applicant's admission. 4 D. & C. 2d 671 (Orph. Ct. Philadelphia). This was affirmed by the Pennsylvania Supreme Court. 386 Pa. 548.

The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

MISCELLANEOUS ORDERS

The United States Supreme Court:

Denied certiorari (i.e., declined to review) in the following cases:

Wichita Falls Independent School District v. Avery (Prior decision 241 F.2d 230, 2 Race Rel. L. Rep. 28, 319 [5th Cir. 1957] in which jurisdiction over a school segregation suit in Texas was ordered retained by a federal district court although integration had been commenced by school authorities.) _____U.S._____, 77 S.Ct. 816, No. 895, April 22, 1957.

Tennessee Board of Education v. Booker (Prior decision 240 F.2d 689, 2 Race Rel. L. Rep. 64 [6th Cir. 1957] in which the immediate admission of Negroes to colleges in Tennessee was ordered by the Court of Appeals although a federal district court had approved a plan of gradual admission over a five-year period.) _____U.S._____, 77 S.Ct. 1050, 25 L.W. 3342, No. 940, May 20, 1957.

Granted certiorari (i.e., agreed to review) in the following case:

NAACP v. State of Alabama (Prior decision 91 So.2d 214, 2 Race Rel. L. Rep. 177 [Ala. 1956] in which the Alabama Supreme Court had affirmed a contempt citation against the NAACP for refusal to produce membership lists in state court proceedings.) _____ U.S._____, 77 S.Ct. 1056, 25 L.W. 3349, No. 846, May 27, 1957.

COURTS

EDUCATION
Public Schools—Arkansas

John AARON, a minor, and Thelma Aaron, a minor, by their mother and next friend, (Mrs.) Thelma Aaron, a feme sole, et al. v. William G. COOPER, M.D., as President of the Board of Trustees, Little Rock Independent School District, et al.

United States Court of Appeals, Eighth Circuit, April 26, 1957, 243 F.2d 361.

SUMMARY: Negro school children in Little Rock, Arkansas, brought a class action in federal district court against school officials of that city. The action sought a declaration of the rights of the plaintiffs to attend public schools without discrimination on the basis of race or color and an injunction preventing enforcement of the Arkansas constitutional and statutory provisions requiring segregation in public schools. The answer of the defendant school officials conceded the invalidity of those provisions. The school officials presented a plan for the gradual integration of the schools, beginning with the high school grades, over a period of approximately six years, to begin in 1957. The district court approved the plan as a "prompt and reasonable start" toward full integration and retained jurisdiction of the case, without granting an injunction, to supervise implementation of the plan. 143 F.Supp. 855, 1 Race Rel. L. Rep. 851 (E.D. Ark. 1956). On appeal the Court of Appeals, Eighth Circuit, affirmed. That court distinguished several decisions of other federal courts requiring earlier integration, stating that the factors in each locality must be considered and may vary and in this case it could not hold that the time allowed was unreasonable.

Before WOODROUGH, VOGEL and VAN OOSTERHOUT, Circuit Judges.

VOGEL, Circuit Judge.

Appellants are Negro children attending the public schools of Little Rock, Arkansas. They brought this action in their own behalf and in behalf of all other Negro minors similarly situated. Appellees are the Little Rock School District, a corporation, the president and secretary of its board, and the superintendent of public schools for Little Rock. On February 8, 1956, appellants filed a complaint in the United States District Court, Eastern District of Arkansas, Western Division, asking that the court define their legal rights and that an injunction be issued against continued segregation of the races in the Little Rock public school system. The case was tried to the court and taken under advisement. A very comprehensive opinion was filed by the trial court incorporating therein findings of fact and conclusions of law as provided for by Rule 52(a), Federal Rules of Civil Procedures, 28 U.S.C.A. In that opinion, the District Court held that a proposed school integration plan had been promulgated by the appellees in good faith, that "the plan which has been adopted after thorough and conscientious consideration of the many questions involved is a plan that will lead to an effective and gradual adjustment of the problem, and ultimately bring about a school system not based on color distinctions". The court held that the adoption of the plan had been prompt and that "it would be an abuse of discretion for this court to fail to approve the plan or to interfere with its consummation so long as the defendants move in good faith, as they have done since immediately after the decision of May 17, 1954, to inaugurate and make effective a racially nondiscriminatory school system". The District Court approved the plan but retained jurisdiction of the case "* * * for the entry of such other and further orders as may be necessary to obtain the effectuation of the plan as contemplated and set forth herein".

[*Plan Adopted*]

The school integration plan of the appellees for the integration of the public schools in Little Rock is stated in entirety in the District Court's opinion published in 143 F.Supp. 855, 859-860. It is accordingly unnecessary to give the details of the plan here. In substance, it is a three-phase program of integration. Phase 1 begins at the senior high school level (grades 10-12) and is scheduled to start in the fall of 1957 upon the completion of a new senior high school building. Phase 2 begins at the junior high school level (grades 7-9) and would start following successful integration at the senior high school level (estimated at two to three years). Phase 3 begins at the elementary level (grades 1-6) and would start after successful completion of phases 1 and 2. Complete integration is planned to be effected not later than 1963.

[*Effect of Brown Decisions*]

In this appeal, all parties recognize the mandate of the Supreme Court in Brown v. Board of Education, 1954, 347 U.S. 483, as "* * * declaring the fundamental principle that racial discrimination in public education is unconstitutional * * *." Brown, et al. v. Board of Education of Topeka, et al., 1955, 349 U.S. 294, 298. In that decision the "separate but equal" doctrine in the field of public education was put to rest. It is on the second and implementing decision of the Supreme Court on this subject that the controversy here centers. Brown, et al. v. Board of Education of Topeka, et al., 1955, 349 U.S. 294. The core of the second Brown decision is that, page 299:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

What is required is that the local courts, in passing on the plans of school authorities and formulating their decrees, give weight to certain equitable principles and administrative problems, while at the same time requiring a prompt and reasonable start toward full compliance with the original Brown decision declaring segregated schools inherently unconstitutional. The court stated, page 300:

> "Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems relating to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially non-discriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

Appellants urge on this appeal that "there are no valid reasons of an equitable or administrative nature warranting appellees being granted an extension of time beyond September, 1957, either in starting or completing desegregation at the junior high and elementary school levels in the Little Rock School District such as proposed by appellees and approved by the judgment below".

[*Good Faith of Board*]

The District Court's approval of the three-phase plan for integration came only after a finding of utmost good faith on the part of the school authorities, which finding is not challenged in these proceedings. The District Court referred to the fact that three days after the Supreme Court's opinion in the first Brown case the school board adopted a statement acknowledging their responsibility to comply and their intention to do so, and directing that a study be made and a plan prepared for the integration of the schools in Little Rock. Such a plan was prepared and approved by the board on May 24, 1955, seven days prior to the decision of the Supreme Court in the second Brown case.

During the trial in District Court the superintendent gave convincing and competent testimony to the effect that under existing conditions gradual integration of the schools was administratively advisable. Desirability of gradual as opposed to immediate integration was premised on factors referred to in the second Brown decision. The superintendent's testimony was not contradicted. Appellants offered no testimony excepting only that of the president of the school board, which supported that of the superintendent.

[*Other Cases Cited*]

Appellants cite to us several cases where Federal Courts have used their injunctive powers to speed up or effectuate integration. (Willis v. Walker, W.D. Ky., 1955, 136 F.Supp. 177; Thompson v. School Board of Arlington Co., E.D. Va., 1956, 144 F.Supp. 239; Clemons v. Board of Education, 6 Cir., 1956, 228 F.2d 853, cert. denied (1956) 350 U.S. 1006; Booker v. State of Tenn. Board of Education, 6 Cir., 1957, 240 F.2d 689). These decisions serve only to demonstrate that local school problems are "varied" as referred to by the Supreme Court. A reasonable amount of time to effect complete integration in the schools of Little Rock, Arkansas, may be unreasonable in St. Louis, Missouri, or Washington, D. C. The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situation at Little Rock, Arkansas, a problem that is entirely different from that in many other places. It was on the basis of such "varied" school problems that the Supreme Court in the second Brown decision remanded the cases there involved to the local District Courts to determine whether the school authorities, who possessed the primary responsibility, have acted in good faith, made a prompt and reasonable start, and whether or not additional time was necessary to accomplish complete desegregation. The question of speed was to be decided with reference to existing local conditions. There is here unqualified basis for the District Court's conclusions that the proposed plan constitutes a good-faith, prompt and reasonable start toward full compliance with the Supreme Court's mandate. Accordingly, we cannot say, even if we were so minded, that the District Court's conclusions were entirely erroneous and should be set aside. Nor can we say that a gradual program of integration beginning at the high school level and ultimately encompassing all grades is an unreasonable one. It may well be, in the light of future events, that the proposed program of integration extends over too long a period and that complete integration for all grades could be effected in a shorter space of time than now anticipated by the board. In that regard, it will be noted that the District Court in its order provided for retention of jurisdiction as directed by the Supreme Court in the second Brown decision. It may be that in the future, as the plan of integration begins to operate, a showing could then be made to the effect that more time was being taken than was necessary. Upon such a finding, the District Court would have the power to see that the plan of gradual integration was accelerated at a greater rate than now proposed. That remains for future determination. Having in mind the formula outlined by the Supreme Court and bound, as we are, by Rule 52(a), Federal Rules of Civil Procedure, we hold that in the light of existing circumstances the plan set forth by the Little Rock School Board and approved by the District Court is in present compliance with the law.

[*Jurisdiction Retained*]

Jurisdiction of this case shall be retained by the District Court to insure full opportunity for further showing in the event compliance at the "earliest practicable date" ceases to be the objective. The prayer for a declaratory judgment and injunctive relief was properly denied.

Affirmed.

EDUCATION
Public Schools—Arkansas

Herbert BREWER et al. v. Leslie HOWELL et al.

Supreme Court of Arkansas, March 18, 1957, 299 S.W.2d 851.

SUMMARY: Taxpayers and residents of the Hoxie, Arkansas, school district brought an action in a state court against district school officials. The action sought an injunction against alleged illegal activities by the school officials and the recovery of public funds. Some of the persons bringing the action had been the subject of an injunction, obtained by the school officials in federal district court and upheld on appeal by the court of appeals (see Brewer v. Hoxie School District No. 46, 238 F.2d 91, 1 Race Rel. L. Rep. 1027 [8th Cir. 1956]), against their interference with efforts of the school board to operate the schools on a racially non-discriminatory basis. The trial court denied the relief sought by the taxpayers' action except for requiring the parties to meet together. On appeal the Arkansas Supreme Court affirmed but modified the decree. One of the questions raised on appeal was the right of the taxpayers to maintain the action under the "clean hands" doctrine; the school officials contending that the suit was brought for the purpose of intimidating them and coercing them into re-establishing segregated schools. The court found no merit in this contention. Part of the opinion, by HARRIS, Chief Justice, follows:

This action was instituted by appellants as taxpayers and residents of Hoxie School District No. 46, seeking the following relief: an injunction against alleged illegal activities by the school board, the recovery of public funds allegedly paid out in violation of the law,[1] an order requiring the school board members to meet with appellants, and an order prohibiting the school directors further serving. The last prayer mentioned was contained in paragraphs ten and eleven of the complaint, and was demurred to by appellees. The demurrer was sustained by the court, and the matter was not raised on appeal. Shortly prior to the trial, appellants amended their complaint, alleging a conspiracy between the school board directors and K. E. Vance, superintendent of schools in the district, to defraud said district, and alleging school funds had been wrongfully expended by Vance, and that the directors had otherwise illegally dissipated the funds. The amendment prayed that the directors and Vance be required to give a complete accounting of all cash funds coming into their possession during the school years 1951 through 1954. On motion of appellees, this amendment was stricken from the pleadings. At the conclusion of the hearing, the Chancellor issued a rather lengthy opinion, discussing fully all of the questions in issue. In accordance with his findings, a decree was entered denying appellants all relief sought, except for an order requiring the board to meet with appellants. From such decree, comes this appeal. . . .

* * *

In passing, we might mention appellees' contention that appellants' suit is barred by the "clean hands" doctrine. Appellees have pleaded that this litigation was filed by appellants solely for the purpose of intimidating the said appellees and coercing them into re-establishing segregation in the Hoxie schools. While it may be true that the integration issue stirred the feelings of the inhabitants of the district, and caused them to look into school matters with more scrutiny than theretofore, we find no merit in the contention. Violations of law, as herein mentioned, had occurred. Efforts to meet with the board members, according to testimony of appellants, had failed, and there were *bona fide* reasons for instituting the suit. The Chancellor was correct in ruling against appellees on this point.

In accordance with this opinion, the case is remanded to the Chancellor with directions to restrain the defendant school directors from employing their wives in any capacity for the district, until said wives have complied with provisions of Sub-sections (d-a) (d-b) of § 80-509, and the provisions of § 80-511 of Ark. Statutes (1947) Annotated. With such modifications, the decree of the Chancellor, in all respects, is affirmed.

1. Salaries paid to wives of certain school directors who were employees of the school district and payment for school supplies made to B. B. Vance, a Hoxie merchant, whose son was a member of the school board.

EDUCATION
Public Schools—Kentucky

Bernard DISHMAN et al. v. M. L. ARCHER et al.

United States District Court, Eastern District, Kentucky, January 17, 1957, Civ. No. 1213.

SUMMARY: Suit was brought in federal district court in Kentucky on behalf of Negro school children seeking to require their admission to public schools in Scott County without regard to race or color. Following a preliminary hearing the parties joined in a motion for a consent decree. The decree was entered by the court. An injunction was denied but the court ordered the school officials "to completely integrate the Scott County school system commencing with the school term beginning in September, 1957" and retained jurisdiction of the case.

FORD, District Judge.

On motion of the attorneys herein, it is hereby ordered as follows:

(1) The request of the plaintiffs for the court to issue interlocutory and permanent injunction ordering the defendants to immediately admit plaintiffs to existing public elementary schools in Scott County, Kentucky, is hereby denied.

(2) The defendants shall completely integrate the Scott County school system commencing with the school term beginning in September, 1957.

(3) This cause shall be retained on the docket for such further orders as may be necessary until the orders of this court have been complied with.

(4) The defendants shall pay the costs of this action.

EDUCATION
Public Schools—Maryland

Ernest HEINTZ et al. v. BOARD OF EDUCATION OF HOWARD COUNTY

Court of Appeals of Maryland, May 10, 1957, 131 A.2d 869.

SUMMARY: Citizens of Howard County, Maryland, brought a petition for a writ of mandamus in a state court in Maryland to require the county Board of Education and individual members thereof to establish and maintain racially separate public schools. On demurrer by the board to the petition, it was urged by the petitioners that the decision of the United States Supreme Court in the *School Segregation Cases*, having been based on the Fourteenth Amendment to the United States Constitution, was invalid because that Amendment had never been legally adopted. The court rejected this argument, citing cases which indicate that the question of ratification of an amendment to the Constitution is a political question which the courts will not determine. The demurrer was sustained and the petition dismissed. 1 Race Rel. L. Rep. 1041 (1956). On appeal the Court of Appeals of Maryland affirmed. The court held that, even if it assumed that the Fourteenth Amendment was not validly adopted, it was bound by the decisions of the United States Supreme Court.

Before BRUNE, C. J., and COLLINS, HENDERSON, HAMMOND and PRESCOTT, JJ.

COLLINS, J.

This is an appeal from a judgment for costs entered as a result of the sustaining of a demurrer, without leave to amend, to the petition of the appellants, for a writ of mandamus, and dismissing that petition.

The petitioners, residents and taxpayers of

Howard County, allege that the law requires the operation of separate schools for white and negro children in Howard County and in the State generally, and ask that a writ of mandamus be issued to the Board of Education of Howard County and the members thereof commanding them to establish and maintain separate schools for colored children under the requirements of Code, 1951, Article 77, Sections 207 and 208, which provide for separate schools for colored youths. A demurrer, filed to the petition by the Board of Education, alleges, among other things, that the matters raised in said petition for said writ of mandamus are res judicata.

[*Contend Decisions Erroneous*]

The contention of the appellants is that the decisions of the United States Supreme Court in the segregation cases, both on the merits and constitutional grounds, were erroneous. In Brown v. Board of Education of Topeka, 347 U.S. 483, 98 L.Ed. 873, decided May 17, 1954, the Supreme Court of the United States held that the segregation of children in public schools, solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprives children of the minority group of equal educational opportunities and amounts to a deprivation of the equal protection of the laws which is guaranteed by the Fourteenth Amendment to the Federal Constitution and, further, that the doctrine of "separate but equal" has no place in the field of public education because separate educational facilities are inherently unequal. The case of Bolling v. Sharpe, 347 U.S. 497, 98 L.Ed. 884, decided May 17, 1954, construed the Fifth Amendment to the Federal Constitution as requiring the same result as to the public schools in the District of Columbia. These cases, without any change in the statute laws of the Federal Government and without any further amendment to the Constitution of the United States on that matter, specifically overruled Plessy v. Ferguson, 163 U.S. 537, 41 L.Ed. 256, decided in 1896, and which had been the leading authority on segregation questions since that date.

[*Political Question*]

The primary contention of the appellants is that the Fourteenth Amendment to the Federal Constitution was never constitutionally proposed or adopted for the reason that more than one-fourth of the states voted to reject it, and its promulgation by the Secretary of State did not validate the amendment, and, further, that the sole power to enforce the Fourteenth Amendment is constitutionally reposed in the Congress. In Leser v. Garnett, 258 U.S. 130, 137, 66 L.Ed. 505, it was argued that the Nineteenth Amendment to the Federal Constitution had not been validly ratified because several of the states named in the proclamation of the Secretary of State as having ratified it, had not in fact done so in accordance with the provisions of their several constitutions. It was there said:

> "The proclamation by the Secretary certified that, from official documents on file in the Department of State, it appeared that the proposed Amendment was ratified by the legislatures of thirty-six states, and that it 'has become valid to all intents and purposes as a part of the Constitution of the United States.' As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. Willoughby on the Constitution of the United States, Vol. 1, 2d Ed., Section 334, pages 600, 601."

[*Coleman v. Miller*]

In Coleman v. Miller, 307 U.S. 433, 450, 83 L.Ed. 1385, 1394, decided June 5, 1939, Chief Justice Hughes, after reciting the history of the adoption of the Fourteenth Amendment, said:

> "This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted. We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment."

Even if we assume that the Fourteenth Amendment was not validly adopted and that the Brown and Bolling cases, supra, were based on delicate social and economic questions and

was pure judicial legislation, as contended by the petitioners, we are faced with the fact that the Supreme Court of the United States has passed upon petitioners' contentions and found them untenable and unsound. Whatever may be the powers of the Supreme Court to correct and overrule its own decisions relating to the construction or interpretation of the Constitution of the United States, we are without any such power. On the contrary we must recognize the binding force of such decisions of the Supreme Court and be controlled by them. Leser v. Board of Registry, 139 Md. 46, 61, 114 A. 840. In Brown, et al. v. Board of Education of Topeka, Kansas, et al., 349 U.S. 294, 99 L.ed. 1083, decided May 31, 1955, it was stated that the courts should require that the defendants, Boards of Education, make a prompt and reasonable start toward full compliance with the Supreme Court's order in the former case of Brown v. Board of Education of Topeka, supra. The Supreme Court having so ruled, the sustaining of the demurrer to the petition was correct.

JUDGMENT AFFIRMED, WITH COSTS.

EDUCATION
Colleges and Universities—Georgia

Horace T. WARD v. REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA et al.

United States District Court, Northern District, Georgia, March 20, 1957. Civ. No. 4355.

SUMMARY: Following the refusal of his application for admission to the University of Georgia school of law in 1950, Ward, a Negro, filed an action in federal district court in 1952 seeking to enjoin university officials from denying him admission solely on the basis of race or color. After delays occasioned by Ward's military service and other reasons, the court, in February, 1957, dismissed the case on grounds that the applicant had failed to renew his application, failed to furnish prescribed character information and had, meantime, enrolled in another law school. 2 Race Rel. L. Rep. 369. Thereafter Ward filed a motion seeking to have the court retain jurisdiction of the case pending his application for admission to the school of law as a transfer student. The court denied the motion because it had already ruled that it did not have jurisdiction and, further, because of "dilatory action on the part of the plaintiff."

HOOPER, District Judge.

ORDER ON MOTION TO RETAIN JURISDICTION

The above stated case was dismissed by this Court on February 12, 1957 for the reason that plaintiff applied for admission to the University of Georgia Law School in September, 1950, subsequently was inducted into the Army for a period of two years, and refused and declined after his release from the Army, and at all times since then, to file any renewed application for admission as required by valid rules and regulations of defendant Law School.

On February 21, 1957, nine days after this case was dismissed, he now files a motion that this Court retain jurisdiction "to the extent that it provide that jurisdiction of this cause be retained pending disposition of plaintiff's application for admission to the University of Georgia School of Law as a transfer student from the Law School of Northwestern University."

His motion stated that "plaintiff is presently in the process of making application for admission to the University of Georgia School of Law as a transfer student from Northwestern University School of Law."

The motion is denied for the following reasons:

(1) It is legally impossible for this Court to retain jurisdiction of this case in view of the fact that the Court has ruled that it does not have jurisdiction, because of the failure of the plaintiff over a period of years to file a renewed application for admission to the University of Georgia School of Law.

(2) This action was predicated upon the

rejection of an application filed in September, 1950 as a first-year student. At a hearing in this Court in September, 1956 plaintiff, having already been accepted as a student in Northwestern University School of Law did not disclose that fact to this Court. Upon the trial of the case December 17, 1956 it developed from testimony adduced by the defendants, that plaintiff would be eligible to apply to defendant Law School for admission as a transfer student with advance credits. It was then represented to the Court that plaintiff could not do so until the credits had been obtained. Final judgment dismissing the case was not entered until February 12, 1957, and at no time prior to that date did the plaintiff contend that he had applied, or was applying, to the University of Georgia School of Law as a transfer student, nor did he do so until February 21, 1957, nine days after judgment.

This dilatory action upon the part of the plaintiff has been indulged in ever since the case was filed. For that additional reason the Court is declining to retain jurisdiction as prayed.

(3) Should the plaintiff obtain the required credits as a student at the Law School of Northwestern University, and should he apply for admission to defendant Law School as a transfer student the plaintiff is now conceding that he will have to file a new application. Throughout the entire pendency of this case, however, plaintiff has consistently taken the position that he would not file any new application and that he would not abide by the rules and regulations of defendant Law School concerning admission of law students. Plaintiff has therefore completely abandoned his application filed in September, 1950 and has abandoned the position he has taken to the effect that he does not have to comply with any of the present rules and regulations concerning admissions. This confirms the Court in its opinion that dismissal of plaintiff's case on February 12, 1957 was proper, and that there is no case now pending which this Court may retain as prayed by plaintiff.

The motion is denied.

This the 20th day of March, 1957.

EDUCATION
Colleges and Universities—Louisiana

Arnease LUDLEY v. BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY et al.
Jack BAILEY et al. v. LOUISIANA STATE BOARD OF EDUCATION et al.
Alma LARK et al. v. LOUISIANA STATE BOARD OF EDUCATION et al.

United States District Court, Eastern District, Louisiana, April 15, 1957, Civ. Nos. 1833, 1836, 1837.

SUMMARY: Act No. 15 of the 1956 session of the Louisiana Legislature (printed as House Bill No. 437 at 1 Race Rel. L. Rep. 730) provides for additional requirements for admission of students to publicly financed institutions of higher learning in the state, including a certificate of good moral character to be furnished by local and parish [county] school officials. Louisiana Act No. 249, 1956, 1 Race Rel. L. Rep. 941, makes the "advocating or in any manner performing any act toward bringing about integration of the races within the public school system" a cause for removal of a permanent teacher in the state. Three separate cases were filed in federal district court by Negroes seeking admission to colleges and universities in Louisiana. In each case the applicant sought to enjoin the enforcement of the act requiring a certificate of good moral character because of his inability, solely because of his race, to secure such a certificate, and attacked the constitutionality of Acts 15 and 249. A preliminary injunction was granted in each case (see 2 Race Rel. L. Rep. 378). The cases having been consolidated for decision, a joint opinion was issued by two

district judges. The court found the two acts in question to be in violation of the Equal Protection Clause of the Fourteenth Amendment because of the required discrimination against Negro citizens. The court held also that Act No. 15, considered alone, was unconstitutional because "the obvious intent of the legislature in passing the Act was to discriminate against Negro citizens."

Before CHRISTENBERRY and WRIGHT, District Judges.

WRIGHT, District Judge.

This litigation concerns another attempt by the Louisiana Legislature to preserve, by law, segregation in the educational institutions of the state. This attempt, while more subtle than its predecessor,[1] nevertheless fails because the Fourteenth Amendment of the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, 307 U.S. 268, 275.

The plaintiffs in these three class actions[2] are now attending various state institutions of higher learning in Louisiana under temporary restraining orders issued by this court.[3] The authorities of these institutions had indicated that the plaintiffs, and all Negroes similarly situated, would be refused registration unless they presented the certificate of eligibility and good moral character signed by their former principals and superintendents as required by Act 15 of 1956[4] of the Louisiana Legislature. Plaintiffs have been unable to obtain the certificate because Act 249 of 1956[5] by the same legislature provides, in effect, that the principals and superintendents will lose their jobs if they sign the certificates.

[*Constitutionality Attacked*]

Plaintiffs, in these proceedings seeking declaratory judgments and injunctive relief, attack the constitutionality of Act 15 of 1956 as well as Act 249 of the same year. Act 15, in pertinent part, provides that "No person shall be registered at or admitted to any publicly financed institution of higher learning of this state unless he or she shall have first filed with said institution a certificate addressed to the particular institution sought to be entered attesting to his or her eligibility and good moral character." The certificate "must be signed by the superintendent of education of the parish, county, or municipality wherein said applicant graduated from high school, and by the principal of the high school from which he graduated." Act 249 of 1956, in pertinent part, provides that "A permanent teacher shall not be removed from office except upon written and signed charges of * * * advocating or in any manner performing any act toward bringing about integration of the races within the public school system or any public institution of higher learning of the state of Louisiana * * *." Plaintiffs contend that it was the plan of the Louisiana Legislature in passing Acts 15 and 249 of 1956 to prevent the registration of Negroes at institutions designated by it as exclusively for white students by jeopardizing the job of any principal or superintendent who certified eligibility of any Negroes for such institutions.

Defendants contend that Acts 15 and 249 of 1956 are entirely unrelated and must be considered separately. They admit that while there

1. See Bush v. Orleans Parish School Board, 138 F.Supp. 336, aff'd 5 Cir. .....F.2d..... (March 1, 1957), 351 U.S. 948.
2. The jurisdiction of this court is invoked under Section 1311, Title 28, United States Code, this being an action that arises under the Fourteenth Amendment of the Constitution of the United States, Section 1, and Section 1981 of Title 42, United States Code, wherein the matters in controversy exceed the sum and value of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.
   The jurisdiction of the court is also invoked under Section 1343, Title 28, United States Code, this being an action authorized by Section 1983, Title 42, United States Code, to be commenced by any citizen of the United States, or other person within the jurisdiction thereof, to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Fourteenth Amendment of the Constitution of the United States, Section 1 and Section 1981 of Title 42, United States Code, which provides for the equal rights of citizens and all persons within the jurisdiction of the United States.
3. It is apparently admitted that the original plaintiff in No. 1833 is now unable to continue at Louisiana State University because of academic difficulties. She maintained a point-hour ratio of 1.3 as against the required point-ratio of 1.5. After the hearing on preliminary injunction, three additional Negro students moved to intervene as parties plaintiff in that action, and their motion to intervene was granted. Since these intervenors were before the court from the inception of this class action because of their being members of the class, and in view of the disposition by this court in Nos. 1836 and 1837 of the identical issues raised in No. 1833, no useful purpose would be served by a second hearing on the application for preliminary injunction in No. 1833.
4. La. R.S. 17:2131-35.
5. La. R.S. 17:443.

may be some question as to the constitutionality of Act 249, they earnestly contend that there can be no question as to Act 15, which, they say, merely requires a certificate of good character before a student may enter an institution of higher learning in the state. Defendants have also moved to dismiss on the grounds that the case is one for three judges and that the defendants, being state agencies, are immune from suit. These latter contentions were rejected in Bush v. Orleans Parish School Board, 138 F.Supp. 336, aff'd 5 Cir., ...F.2d ....., 351 U.S. 948,[6] and need not be considered further here.

[*Legislative Intent*]

Since the constitutionality of the two statutes in suit will depend, at least to some extent, on the intention of the Legislature which enacted them, we turn to that consideration. The Louisiana Legislature at its regular session in 1956, without a dissenting vote in either the Senate or House of Representatives, passed thirteen acts designed to maintain separation of the races in schools, in parks and playgrounds, in athletic events, in toilet, eating and drinking facilities, and in waiting rooms for passengers in intrastate commerce. Two of the measures proposed amendments to the State Constitution, the first preventing suits against agencies of the state, such as school boards, without consent of the Legislature, and the second proposing various barriers to voting registration.

This segregation legislation was sponsored by the Joint Legislative Committee on segregation. This Committee was supported during the fiscal year 1955-56 on moneys received from the Board of Liquidation of the State Debt. In his application to the Board for the allotment of the money for the Committee, the Chairman of the Joint Legislative Committee wrote:

> "Although we have strong laws upon our books which will enable the State of Louisiana to make a very strong fight for separation of the races in our public schools, the greater part of our work still lies ahead of us. This committee must aid in coordinating the state's defense of its official policy of segregation, and we must also make studies of every legal and social attack made upon the state's policy in order to formulate any additional legislation that may be needed to preserve, affirm and extend this policy." (Resolution No. VII, Appropriation No. V, Board of Liquidation of the State Debt, July 7, 1955.)

In addition to this statement by the Chairman of the Joint Legislative Committee on segregation, respecting the purpose of segregation legislation generally, there are various other statements[7] referred to in 17 La.L.Rev. 112, indicating that the specific purpose of the two acts in suit is to prevent the registration of Negroes at institutions of higher learning in the state designated as exclusively for white students. These statements show beyond question that it was the intention of the Legislature that any teacher who signs a certificate for a Negro student to go to a white school will sacrifice his tenure.

[*Effect of Acts*]

The legislation has operated in practice pursuant to the intentions of its authors. Not a single principal of a public school or superintendent of a public school system has signed a certificate for a Negro to go to a white school. The combined effect, therefore, of the legislation in suit, Acts 15 and 249 of 1956, is the same as if the Legislature had simply provided, as it did in 1954, "All public * * * schools in the state of Louisiana shall be operated separately for white and colored children."[8] The fact that a transparent device is used, calculated to effect this same result, does not make the legislation less unconstitutional. Lane v. Wilson, supra; Guinn v. United States, 238 U.S. 347.

The defendants' earnest suggestion that, irrespective of the constitutionality of Act 249, Act 15 of 1956, merely requiring a certificate of good character for admission to a state institution of higher learning is not unconstitutional, is also without merit. Act 15 does not merely require a certificate of good character. It requires a certificate of good character addressed to the particular institution sought to

6. The action by the Supreme Court was limited to denial of application for writ of mandamus requiring the convention of a three-judge court.

7. There is no legislative history, such as copies of committee reports and floor debates, available on the legislation in suit. The intention of the legislators, however, has been publicly proclaimed again and again.

8. Act 555 of 1954, La. R.S. 17:331.

be entered. Addressing a certificate of good character for a Negro to a particular institution, a white institution for example, jeopardizes the job of the principal or superintendent addressing the certificate. Thus Acts 15 and 249 are integrally related. They are both part of the same transparent device. Moreover, the requirement in Act 15 that the certificate be signed by both the principal of the school and the superintendent of education makes assurance doubly sure that no Negro will be able to obtain such a certificate. If, for example, a Negro graduate of a parochial school were successful in obtaining the signature of the principal of his school, such principal not being subject to the state's tenure law, the signature of the parish superintendent of education would still be unavailable because his position would be jeopardized by his signing.

This scheme of dividing discriminatory legislation into two separate acts, one apparently innocuous, was used by the 1954 Louisiana Legislature and was condemned in Bush v. Orleans Parish School Board, supra. Cf. Davis v. Schnell, 81 F.Supp. 872, aff'd 336 U.S. 933. There a statute,[9] apparently valid on its face, became unconstitutional when applied in tandem with discriminatory legislation.[10] Even considered alone and without reference to Act 249, Act 15 would still be unconstitutional for the reason that the obvious intent of the Legislature in passing the Act was to discriminate against Negro citizens and thus to circumvent the Equal Protection Clause of the Fourteenth Amendment. See Yick Wo v. Hopkins, 118 U.S. 356; Davis v. Schnell, supra.

Decree to be drawn by the court.

9. Act 556 of 1954, in pertinent part, provided: "Each Parish Superintendent of Schools, throughout this State, shall each year, determine the particular public school within each Parish to be attended by each school child applying for admission to public schools. No school child shall be entitled to be enrolled or to enter into a public school until he has been assigned thereto in accordance with the provisions of this Act."
10. Act 555 of 1954, in pertinent part, provided: "All public elementary and secondary schools in the state of Louisiana shall be operated separately for white and colored children. This provision is made in the exercise of the State police power to promote and protect public health, morals, better education and the peace and good order in the state and not because of race."

GOVERNMENTAL FACILITIES
Golf Courses—Florida

Elmer A. WARD et al. v. The CITY OF MIAMI, Florida, et al.

United States District Court, Southern District, Florida, April 30, 1957, Civ. No. 6821-M.

SUMMARY: Under an arrangement previously entered into, the City of Miami, Florida, had permitted Negroes to use the city-owned Miami Springs Country Club Golf Course on Mondays of each week and had excluded them on other days. The plaintiffs, Negroes, applied for permission to use the golf course on a day other than Monday and were refused. They then brought suit in federal district court to require the city and its officials to admit them to the golf course on the same basis as other citizens of Miami. The court, citing recent decisions of the United States Supreme Court holding segregation on the basis of race of various governmental facilities to be unconstitutional, issued a permanent injunction against the city. The injunction requires the admission of Negroes on the same basis as white persons.

CHOATE, District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial before the Court sitting without a jury on the 14th day of March, 1957, and the Court having heard the testimony of the witnesses and having considered all the evidence herein, together with the other matters of record and the memoranda submitted by counsel for the respective parties, does find and hold as follows:

FINDINGS OF FACT

(1) The City of Miami, Florida, does now and at all times pertinent to this suit has owned

and operated a golf course known as the Miami Springs Country Club Golf Course.

(2) On Thursday, January 26, 1956, the negro Plaintiffs, residents of the City of Miami and citizens of the United States and of the State of Florida, requested the starter at the Miami Springs Country Club Golf Course to sell them tickets which would admit them to the use of the course upon the same conditions and terms as persons of the white race.

(3) The Defendant, Woodrow Laughinghouse, Superintendent of the said golf course, refused to permit the Plaintiffs to use the said golf course on January 26, 1956, because that day was not a Monday and under the instructions he was given by his superiors, negroes could use the golf course on Mondays only.

(4) The policy, practice, and custom of the City of Miami, as admitted by the Assistant City Attorney at the Pre-Trial and Trial of this cause (pages 2, 3 and 5 of the Transcript of Testimony filed March 25, 1957), is to limit the use by negro residents of Miami of the said Miami Springs Country Club Golf Course to Mondays only and not to permit them to use the course at any other times.

(5) At the trial of this case, the defendants offered no testimony or other evidence to rebut or contradict any of the above facts as established by the evidence.

CONCLUSIONS OF LAW

(1) The Court has jurisdiction of the parties and the subject matter herein.

(2) The policy, custom, usage, and practice of the City of Miami in restricting its negro residents to the use of the city's golfing facilities to one day each week and at no other times, is unconstitutional under the decisions of Holmes v. City of Atlanta, 350 U.S. 879 (1955); *Id.*, 223 F.2d 93 (5th Cir. 1955); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955); *Id.*, 220 F.2d 386 (4th Cir. 1955); City of St. Petersburg v. Alsup, No. 16100, United States Court of Appeals for the Fifth Circuit, Dec. 19, 1956.

(3) The Court holds to be unconstitutional the actions of the Miami City Commission and its several officers and agents, in prohibiting or attempting to prohibit its colored citizens and taxpayers, either or both, from using the city golf course on the same basis and upon the same conditions as white citizens of Miami are permitted to use the same, in that the said actions of the city constituted unlawful attempts to segregate and distinguish between citizens, in their rights as citizens, based purely upon color, and such acts should, therefore, be restrained.

(4) The decisions of the United States Supreme Court and of the Florida Supreme Court in the case of Rice v. Arnold, 45 So.2d 195 (Fla. 1950); 340 U.S. 848 (1950); 54 So.2d 114 (Fla. 1951); 342 U.S. 946 (1952); do not affect the case at bar. Though that case dealt with not only the golf course in question, but in addition with the "one day a week for negro golfers" rule at bar, it merely decided the very narrow point that the relator in mandamus in the Rice case was not entitled as a matter of right to an order permitting him to use the city's sole public golf course at *all* hours and times when it is open for play. Of even far greater importance is the fact that the Rice case oscillated between the courts and finally came to rest a full two years before the Brown decision (Brown v. Board of Education, 347 U.S. 483 (1954)).

In Hayes v. Crutcher, 137 F.Supp. 853 (M.D. Tenn. 1956), the District Court for the Middle District of Tennessee vacated its "pre-Brown" decision (at 108 F.Supp. 582), which earlier decision upheld the "one day a week for negro golfers" rule. The District Court, with honest judicial conviction, recognized the changed state of the law as developed by the Brown case, Holmes v. City of Atlanta, 350 U.S. 879 (1955), and Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955).

(5) The Court will enter its Final Degree in favor of the Plaintiffs and against the Defendants.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of April, 1957.

FINAL DECREE AND PERMANENT INJUNCTION

The Court having entered its Findings of Fact and Conclusions of Law this 30th day of April, 1957, in which Findings the Court held that the policy, custom, usage and practice of the Defendants in refusing to permit negro golfers to make use of the Miami Springs Country Club Golf Course on the same basis and upon the same conditions as white citizens of Miami,

Florida, are permitted to use the same, as being unconstitutional, it is, therefore,

ORDERED AND DECREED that the Defendants, their agents, servants, and successors in office, are hereby permanently enjoined from refusing to allow the Plaintiffs and other negroes similarly situated to use the city-owned golf course on the same basis and upon the same conditions as white citizens of Miami, Florida, are permitted to use the same, and it is,

FURTHER ORDERED AND DECREED that the above permanent injunction be and the same is hereby stayed, and will not go into effect until 12:00 o'clock noon, Friday, May 10, 1957.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of April, 1957.

GOVERNMENTAL FACILITIES
Golf Courses—North Carolina

George SIMKINS, Jr., et al. v. The CITY OF GREENSBORO et al.

United States District Court, Middle District, North Carolina, March 18, 1957, 149 F.Supp. 562.

SUMMARY: Six Negro citizens of Greensboro, North Carolina, were convicted in a state court and given sentences of confinement for criminal trespass for having attempted to use the Gillespie Park Golf Course without permission of the manager. The convictions are being appealed to the North Carolina Supreme Court. The defendants in that case, together with others, then brought an action in federal district court in North Carolina seeking injunctive relief and a declaratory judgment as to their right to use the golf course. The golf course, although municipally owned, had been leased by the city to a corporation and the action was brought against the city and the corporate lessee. The city conceded that it could not constitutionally deny Negroes the use of municipal facilities while permitting their use by white persons but maintained that the denial of use of the golf course was done by the corporate lessee and not the city. The court held that the right to use the golf course "can not be abridged by the lessee; so long as the course is available to some of the citizens as a public park it can not be lawfully denied to others solely on account of race." The court entered a decree restraining the defendants from discriminating against the plaintiffs or other Negro residents of the city in the use of the course and from disposing of the golf course other than by a bona fide sale.

HAYES, District Judge.

OPINION

The City of Greensboro and the Greensboro City Board of Education concede that they cannot own and operate the Gillespie Park Golf Course for the public and exclude the plaintiffs and other Negro citizens of Greensboro from these privileges on account of their color.

Although the golf course has been available to the public for many years, whether by design or otherwise, Negroes have been denied the enjoyment of the privilege.

The City of Greensboro, before Brown v. Board of Education, 347 U.S. 483, in an effort to comply with Plessy v. Ferguson, 163 U.S. 537, erected in the City of Greensboro a nine hole golf course for Negroes, known as Nocho Park Golf Course but it cannot be deemed the equivalent of an 18 hole golf course like Gillespie Park course which was restricted to white people.

The Board of Education leased the land it did not need for school purposes at the time to the City of Greensboro. Through Works Progress Administration, which furnished 65% of the cost, the City of Greensboro built the last nine holes and agreed not to sell or lease for private use this public property during its life of usefulness.

[*Lease Arranged*]

Some of the Negro citizens applied to the City authorities for permission to play on the Gillespie Park course in 1949 and, because of opposition on the part of local citizens against Negroes

playing on the course, after some negotiation, the City of Greensboro and City Board of Education entered into a lease contract whereby the entire golf course was leased to Gillespie Park Golf Club, a non-profit corporation which was organized solely for the purpose of taking the lease and maintaining and operating the course as a public golf course. G. S. 55-11.

It is true the directors met with a quorum at first and fixed $60.00 for annual membership which permitted them to play without paying additional fees; also authorized $1.00 membership who would pay $1.25 green fees on holidays and weekends, and 75c on other days.

The records of the corporation do not disclose sufficient data to show if rules were really established and enforced in respect to membership. The evidence does clearly show that White people were allowed to play by paying the green fees without any questions and without being members. When Negroes asked to play, they were told they would have to be members before they could play and it clearly appears that there was no intention of permitting a Negro to be a member or to allow him to play, solely because of his being a Negro.

[*Plaintiffs Denied Facilities*]

The six plaintiffs presented themselves at the desk of the man in charge of the golf course and laid down 75c each and asked to play, the first named plaintiff being a dentist and practicing his profession in Greensboro. But they were not given permission to play. They insisted on their right to play and played three holes. While playing the third hole, the manager came and ordered them to leave and they refused to go unless an officer arrested them. Whereupon the manager swore out a warrant charging each with trespass, upon which they were tried, convicted and sentenced to 30 days in jail, the statutory limit, from which an appeal is pending in the Supreme Court of North Carolina.

The Negroes have not only been denied the privilege of the golf course but there is no intention on the part of the defendants to permit them to do so unless they are compelled by order of court.

This case presents two questions for determination. First; are plaintiffs, being citizens and taxpayers of the City of Greensboro, entitled to the privilege of playing on the defendant's golf course as long as it is owned and used for the convenience of the citizens of Greensboro? Second; can the defendants avoid giving equal treatment to the plaintiffs in the use of the facility by leasing it to a private corporation or can the lessee deny plaintiffs the right to play solely on account of color and thereby accomplish a result which is denied to the owner?

It is conceded that the defendants ordinarily are not required to furnish a golf course for its citizens. If, however, it undertakes to do it out of the public treasury, it cannot constitutionally furnish the facility to a part of its citizens and deny it to others similarly situated.

[*Separate-but-Equal Overruled*]

The plaintiffs as citizens of the City of Greensboro are entitled to the equal protection of the law and cannot be deprived of their rights solely on account of color. The doctrine of Plessy v. Ferguson, supra, of equal but separate facilities, has been overruled in Brown v. Board of Education, supra.

Before Brown v. Board of Education, supra, the Supreme Court held that the election laws of the State could not be delegated to a political organization and empower it to deny Negroes the right to participate in the primary, and the action of such an agency was State action within the meaning of the Fourteenth Amendment and that the discrimination against the Negroes violated the Amendment. Nixon v. Condon, 286 U.S. 73. The members of the Supreme Court who declared that law were Chief Justice Hughes, and Associate Justices Brandeis, Stone, Roberts and Cardozo. It is appropriate to quote from Justice Cardozo's opinion:

> "The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.
>
> "With the problem thus laid bare and its essentials exposed to view, the case is seen to be ruled by Nixon v. Herndon, supra. Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. Ex parte Virginia, supra; Buchanan v. Warley, 245 U.S. 60, 77. The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays

> a duty upon the court to level by its judgment these barriers of color."

To the same effect is Rice v. Elmore, 165 F.2d 387 (4CCA).

[*Other Cases*]

The Fourth Circuit Court has ruled that public parks are controlled by the same principles of constitutional law as are controlling in public education. Dawson v. Baltimore, 220 Fed. 2d 386, affirmed 350 U.S. 877. Again that court held in Department of Conservation v. Tate, 231 Fed. 2d 615, that citizens of the State have right to use parks thereof without discrimination on ground of race; that these rights cannot be abridged by leasing parks with ownership being retained by the State. Derrington v. Plummer, 5 CCA, 240 F.2d 922.

Judge Moore in Lawrence v. Hancock 76 F. Supp. 1004, in a similar situation said:

> "It is not conceivable that a city can provide the ways and means for a private individual or corporation to discriminate against its own citizens. Having set up the swimming pool by the authority of the Legislature, the city, if the pool is operated, must operate it itself, or, if leased, must see that it is operated without any such discrimination."

The brief filed by the City of Greensboro contains this significant statement, in its statement of facts:

> "In December, 1955, six of ten plaintiffs in this action were denied the use of Gillespie Park Golf Course by employees of Gillespie Park Golf Club, Inc. That same month the City Council instructed the city Manager to proceed forthwith to receive bids for the sale of Gillespie Park Course and upon such sale to close the Nocho Park course. The land upon which the latter is situated is to be used for governmental purposes and is not to be sold."

The facts show that the City is still "in the saddle," so far as real control of the park is concerned and that the so-called lease can be disregarded, if and when, the City decides to do it. It also lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens in the enjoyment in the use of the park. The threatened sale is the procedure pursued in Clark v. Flory, 141 F.Supp. 248; affirmed in 237 F.2d 597.

[*Lease Does Not Defeat Rights*]

The City of Greensboro contends that Holmes v. Atlanta, 350 U.S. 879; Hayes v. Crutcher, 137 F.Supp. 853; Augustus v. Pensacola,.....Fed. Supp....., N. D. Fla., and Holley v. Portsmouth,.....Fed. Supp....., (E.D. Va.) are inapplicable because they dealt with anticipated leases while in the instant case the lease existed before this suit was brought. It further contends that the lease is valid under the North Carolina law and therefore the valid existing lease "freezes" the status quo and leaves the court without power to do anything. If this logic is sound, constitutional rights are a delusion and a snare. Such hitherto sacred rights can not be abridged by a mere lease between the city and a third party and the courts are not made impotent to afford relief. To hold otherwise would open a Pandora's box by which governmental agencies could deprive citizens of their constitutional rights by the artifice of a lease. If the lessee desires to continue to operate the golf course, it must do so without discrimination against the citizens of Greensboro. This public right can not be abridged by the lessee; so long as the course is available to some of the citizens as a public park it can not be lawfully denied to others solely on account of race.

[*Exhaustion of Remedies*]

The private corporation challenges the right of plaintiffs here because it contends they have not exhausted their administrative remedies, relying on Carson v. Warlick, 283 F.2d 724, and other cases dealing with enrollment in educational institutions. These cases are not in point. This golf club permits white people to play without being members, or otherwise, except it requires the prepayment of green fees. The plaintiffs here paid their fees, were forced off the course by being arrested for trespass. Everybody knows this was done because the plaintiffs were Negroes and for no other reason. This court can not ignore it. Moreover, there existed no known and uniform procedure of an administrative nature to be exhausted by plaintiffs. Admittance to a park or golf course is unlike enrolling in an educational institution.

A decree will be entered declaring that these plaintiffs have been denied on account of their

color, equal privileges to use the golf course owned by the City Board of Education and the city of Greensboro, and operated by the Gillespie Park Golf Club, and permanently restraining the defendants from discriminating against plaintiffs and other members of their race on account of color, so long as the golf course is owned by these agencies and operated for the pleasure and health of the public, their agents, lessees, servants and employees.

[*Decree Deferred*]

The court invited counsel for the respective parties to confer and to suggest to the court the best practical way to make effective the decree, in the event the plaintiffs prevailed. The final decree will be deferred a short time to get the result of this conference.

Citizenship in the United States imposes uniform burdens, such as paying taxes and bearing arms for the preservation and operation of our government. In like manner whatever advantages or privileges one citizen in the United States may enjoy through his liberty becomes the constitutional right of each citizen and without regard to race, color or creed. These principles of law have been fully and elaborately established in the Fourth Circuit Court of Appeals and by the Supreme Court of the United States and must be adhered to in this case.

This the 18th day of March, 1957.

DECREE AND INJUNCTION

This cause coming on for hearing and the court having heard the evidence and argument of counsel and carefully considered the same and the briefs filed, and having made the findings of fact and conclusions of law which appear of record;

It is now ORDERED, ADJUDGED and DECREED that defendants have unlawfully denied the plaintiffs as residents of the city of Greensboro, N.C. the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained, will continue to deny plaintiffs and others similarly situated;

And be it further ORDERED, ADJUDGED and DECREED:

1. The defendants and each of them, and the officials, servants and employees of each of said defendants are hereby forever restrained and enjoined from disposing of the public property described and used as the Gillespie Park Golf Course, except by a bona fide sale.

Reservation. This court will retain jurisdiction and the power to modify this paragraph upon application and on ten days notice to the plaintiff.

2. The defendants and each of them, and the officers, agents, servants and employees of each of said defendants are hereby forever restrained and enjoined against any discrimination against the plaintiffs or any other Negro resident of the City of Greensboro in the use of said golf course; No restrictions or conditions shall be imposed against the Negroes except those imposed against the White residents of the City of Greensboro. This paragraph shall become effective 40 days after this decree is filed in the office of the Clerk of this court at Greensboro.

3. The application by the City of Greensboro and the Gillespie Park Golf Club, Inc., for a stay pending appeal is denied because of the delay of the effective date of paragraph 2 hereof, in which time the defendants can apply to the Circuit Court for a stay. It has been known by the defendants since March 18, 1957, that the decree would be entered and time was allowed by the court for the parties to agree on a date, as this court was unwilling to deny the plaintiffs their constitutional rights except by their consent.

Except as stated above this decree shall take effect upon its filing in the office of the Clerk of this court at Greensboro, N.C.

It is ORDERED that the costs be taxed against the defendants City of Greensboro and The Gillespie Park Golf Club, Inc. No cost is to be taxed against the School Board because it had leased the property to the City and the City induced the School Board to transfer the lease to the Golf Club. It does not appear that the School Board promoted or encouraged the discriminatory conduct of the co-defendants.

Entered April 24, 1957.

* * *

The defendants and each of them are allowed an exception to the signing of the judgment.

GOVERNMENTAL FACILITIES
Golf Courses—Virginia

James W. HOLLEY, III, et al. v. The City of PORTSMOUTH, Virginia, et al.

United States District Court, Eastern District, Virginia, April 10, 1957, 150 F.Supp. 6.

SUMMARY: An action seeking an injunction against officials of the city of Portsmouth, Virginia, was brought in federal district court by Negro citizens of that city. The plaintiffs sought to enjoin the denial by city officials of the use of city recreational facilities, particularly City Park Golf Course, solely on the basis of race or color. On motion by the plaintiffs the court granted a preliminary injunction. 1 Race Rel. L. Rep. 1059 (1956). After a hearing on the motion for a permanent injunction, the court declined to enter a permanent injunction at this time but continued the motion for one year. The court found that the city officials were complying with the temporary injunction and that "the passage of time may result in an adjustment of many of these problems."

HOFFMAN, District Judge.

MEMORANDUM

On January 3, 1952, in the case of Green v. The City of Portsmouth, Civil Action No. 1271, this Court, speaking through District Judge Albert V. Bryan, entered an order restraining and enjoining the City of Portsmouth, its officers, agents, etc., from maintaining and operating golf facilities for the use of its citizens of any race without providing substantially equal facilities for persons of all races. Prior to the entry of the aforesaid injunctive order, the City had permitted only members of the white race to use the golf course in question, and no provision had been made for Negro citizens to play golf on any municipal course. Subsequent thereto, the City permitted Negroes to use the facilities on Fridays only, at which time the members of the white race were excluded.

Matters remained in *status quo*, with Negroes using the golf course on Fridays, until the "separate but equal" doctrine was abolished by the United States Supreme Court in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, followed by Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774, affirming Dawson v. Mayor, etc., 4 Cir., 220 F. (2d) 386, and Holmes v. City of Atlanta, 350 U.S. 879, 76 S.Ct. 143, 100 L.Ed. 776, reversing 223 F.(2d) 93. There is no longer any room for doubt that the separate but equal doctrine has ceased to exist with respect to governmental facilities including golf courses, swimming pools, bathing beaches, parks, etc.

Merely because the City was acting in compliance with the prior order of this Court affords no protection after the United States Supreme Court placed a contrary interpretation on the validity of the separate but equal doctrine. Flemming v. South Carolina Electric and Gas Co., 4 Cir., 239 F.(2d) 277. Directly in line with the present factual situation is Hayes v. Crutcher, 137 F.Supp. 853, wherein the Court set aside a prior order permitting members of the Negro race to use a municipal golf course on specified days and thereafter granted unlimited use.

On Sunday, July 15, 1956, plaintiffs, residents of the City and all members of the Negro race, appeared at the golf course and requested permission to play. They were denied this right and were told that Negroes could only use the course on Fridays. They employed counsel who, in turn, endeavored to arrange a conference with City officials. Their letter remains unanswered. This action for a preliminary and permanent injunction followed within a matter of days.

[*Temporary Injunction Granted*]

On August 29, 1956, the Court granted a temporary injunction restraining the defendants from denying free and unrestricted use and enjoyment of the golfing facilities to the plaintiffs and other Negro residents on account of race and color. Since that date the City has complied in every respect with the order and the evidence reveals that Negroes have used the facilities whenever desired and without incident.

The City Manager, under whose direct super-

vision the golf course is operated, testified that, while he could not speak officially for the City, as long as he remained City Manager he intended to abide by the policy of unrestricted use by members of all races as he was cognizant of the law as it is now interpreted. The City Attorney stated to the Court that the City Council had been advised by him that, under the law, unrestricted use by all races must be granted, subject to reasonable rules and regulations applicable to all.

Upon conclusion of the evidence the Court expressed doubt as to the necessity of a permanent injunction and concluded to permit the matter to remain in its present status under the temporary injunction now in existence, for an additional period of one year, at which time the Court will then determine whether there is "reasonable expectation that the wrong will be repeated". If no such reasonable expectation as to repetition is then probable, the case may be dismissed.

[*Court Authority*]

There is authority to support the Court's action in United States v. W. T. Grant Co., 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303, and, while the instant case is perhaps not "moot" at the present time, it may become so if the defendants can demonstrate that "there is no reasonable expectation that the wrong will be repeated". As the Supreme Court said:

> "Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of illegal conduct. Hecht Co. v. Bowles, supra; Goshen Mfg. Co. v. Myers Mfg. Co., 242 U.S. 202 (1916). The purpose of an injunction is to prevent future violations, Swift & Co. v. United States, 276 U.S. 311, 326 (1928), and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the Court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations."

In the days of great emotional stress throughout the Southern states following the decision of the Supreme Court in Brown v. Board of Education, supra, it is gratifying to note that some steps have been taken by the City to comply with the law. True, the defendants herein are adhering to the terms of a temporary injunction which remains in effect, but the fact is that seven months have elapsed without any disruption of normal operations at the golf course and with total absence of an unfortunate incident tending to disturb relations between races. The case may not be moot at this time, but within one year it is not unlikely that the entire governing body of the City will indicate a willingness to accept the inevitable result as being the law of the land. At such time, if not prior thereto, there would no longer be any need for injunctive relief as there would be "no reasonable expectation that the wrong will be repeated".

The situation is not unlike the developments following the abandonment of Virginia state laws requiring segregation of passengers on public conveyances operating intrastate. If there have been any racial disturbances in Virginia by reason of such change, it has not come to the attention of this Court. Similarly, it was pointed out in the argument of counsel that the City of Norfolk operates a municipal golf course on a lease basis and that, following this Court's decision in Tate v. Department of Conservation and Development, 133 F.Supp. 53, affirmed 231 F.(2d) 615, certiorari denied, 352 U.S. 838, the lessee permitted members of all races to use said golf course[1]. The passage of time may result in an adjustment of many of these problems.

No one can be prejudiced by the action of the Court in staying proceedings to await developments. The plaintiffs and all members of the Negro race will still be able to use the golf facilities owned and operated by the City. With a reasonable spirit of cooperation the need for further relief will be eliminated. Moreover, as was said in the W. T. Grant Co. case, a dismissal "would not be a bar to a new suit in case possible violations arise in the future". Should it thereafter become necessary to institute another ac-

(1) It is not suggested that, where a lessee pays ground rent on a reasonable basis and private capital is used for the construction and operation of the golf course with no expense to the taxpayers, the Tate case should be controlling as such a situation would not be a governmental facility or operation.

tion, the Court has ample authority to assess adequate attorney's fees against the defendants in any action deemed appropriate.

Order accordingly.

ORDER

For reasons this day stated in a memorandum filed herein, the future hearing on plaintiffs' motion for a permanent injunction is ORDERED continued for a period of one (1) year for the purpose of determining whether further relief is needed in the light of developments as disclosed by the evidence.

GOVERNMENTAL FACILITIES
Public Housing—Michigan

Toscanelli ASKEW et al. v. BENTON HARBOR HOUSING COMMISSION et al.

United States District Court, Western District, Michigan, December 21, 1956. Civ. No. 2512.

SUMMARY: Negro citizens of Michigan brought a class action in federal district court seeking a declaration of their rights to be admitted to public housing facilities in Benton Harbor, Michigan, without discrimination as to race or color. The action was brought against the city housing commission and its members and alleged that the delay or denial of housing on the basis of race deprived the plaintiffs of rights secured to them by the Fourteenth Amendment to the United States Constitution. While the case was pending, additional Negroes who were also veterans of World War II sought to intervene in the suit in order to test the delay or denial of their admission to public housing projects limited to veterans. At a preliminary hearing the court, on August 5, 1955, permitted the intervention of the veteran plaintiffs (see below). The plaintiffs then moved for summary judgment. The court granted the motion, holding that, under the decision in the *School Segregation Cases*, segregation in public housing on the basis of race is, *per se*, a denial of the equal protection of the laws.

[OPINION OF AUGUST 5, 1955, PERMITTING INTERVENTION OF VETERAN PLAINTIFFS.]

KENT, District Judge.

The original plaintiffs filed their complaint on October 18, 1954. The complaint, in effect, alleged that the plaintiffs were Negro citizens of the United States, residing either in the City of Benton Harbor or in the County of Berrien, Michigan, in which the City of Benton Harbor is located; that they had applied for and were eligible for admittance to certain public housing projects which were under the jurisdiction of the defendant Benton Harbor Housing Commission, a municipal corporation, its members and its director, all of whom were named as defendants. It is the claim on the part of the original plaintiffs that they were barred from admission to these public housing projects because the defendant commission, its members and director, are now and have been since the origination of these housing projects, pursuing a stated policy of racial discrimination or segregation; and that under that policy one of the projects was limited to white occupancy, and the other was limited to occupancy by Negroes who were eligible for the type housing provided in these two projects.

[*Motion to Intervene Filed*]

Subsequently, on April 1, 1955, there was filed in behalf of Morgan and Herd, a motion to intervene as party plaintiff, alleging grounds similar to those alleged in the original complaint; and, in addition, alleging that the persons moving to intervene, Morgan and Herd, were veterans of World War II, which would not make them more eligible for admission to the first two projects or to the project open to them, but would give them preference as to the time of admission to such low-cost housing.

The intervenors' complaint, attached to the

motion, alleges that Morgan and Herd are Negro citizens of the United States, veterans of the Army of the United States during World War II, who reside in Benton Harbor, Michigan, or in Berrien County, Michigan.

In addition, Morgan and Herd have asked leave to amend the intervenors' complaint to show that the defendants are the operators of veterans' housing as well as the two projects covered by the original complaint and the original intervenors' complaint. It is claimed, in the amended intervenors' complaint, that the Benton Harbor Housing Commission, defendants in this action, including its members and director, have charge of a third project for veterans. It is further the complaint that the Benton Harbor Housing Commission has a stated policy of barring Negro veterans from this third housing project.

The record should show that the motion to intervene had not been heard prior to the motion to amend, and that the defendants have not yet filed an answer to the original intervenors' complaint because no motion has been granted to intervene.

[*Questions Raised*]

The essential questions raised by both the original complaint and the intervenors' complaint, including the amendment, are whether persons otherwise qualified for the public housing in question may be denied admission to housing on the basis of race or color due to a policy, custom or usage of segregation followed and enforced by these defendants. The only aspect of the intervenors' claims which differs from the claims of the original plaintiffs is that the intervenors are veterans, whereas the original plaintiffs make no such claim, and there is added a further housing project limited to veterans.

The defendants take the position that the court, before permitting intervention, must first determine whether or not the original plaintiffs and the intervening plaintiffs are or were, at the time of application, eligible for housing in the housing projects under the control of the defendant commission. It is the court's conclusion that this is a question of fact to be determined on the disposition of this case on its merits, and not an issue which can be determined on a motion for intervention.

[*Civil Rights Acts*]

There would appear to be no doubt that the court has jurisdiction of this case under the Civil Rights Acts, 42 U.S.C.A., Sections 1981 and 1982, which provide as follows:

Section 1981 reads:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no others."

Section 1982 reads:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The court also has jurisdiction under the acts contained in 28 U.S.C.A. at Sections 1331 and 1343(3), which read as follows.

Section 1331: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Section 1343(3) reads in part, including the heading to the section:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation, under color of any . . . statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Rule 23(a) of the Rules of Civil Procedure, subsection (3), speaking of class actions, says:

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the charac-

ter of the right sought to be enforced for or against the class is

> "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Defendants deny that plaintiffs' civil rights have been infringed or in any way abridged by their actions, but concede the jurisdiction of the court.

[*Spurious Class Action*]

Plaintiffs bring this action under the quoted Rule 23(a)(3) as a class action, on the theory that the rights sought to be enforced are several, but that the questions of law or fact raised are common. It could thus be classed as a spurious class action.

Barron and Holtzoff, Federal Practice and Procedure, Volume 2, in discussing the spurious class action, Section 562, at pages 145 and 146, states:

> "The spurious class action involves a right sought to be enforced, which is several, where there is a question of law or fact affecting the several rights, and a common relief is sought." Citing rule which we have earlier quoted.
>
> "The spurious class action is a permissive joinder device involving numerous persons having separate or several rights for which a common relief is sought based on common questions of law or fact."

And in the pocket supplement to that volume, under that section heading, at page 34, the authors say:

> ". . . it seems clear that an action to redress racial discrimination in violation of personal rights of many individuals may be brought as a spurious class action under Rule 23(a)(3) notwithstanding the rights are individual and several."

Among the considerations which the court must take into account in determining a motion for intervention are: the possibility of delay of the original action, which does not exist here and the court so finds; the possibility of prejudice to the determination of the rights of the original parties, and no claim is made and the court finds that there would be no such prejudice; the possibility of prejudice to the intervenors' rights, and the court finds that there will be no such prejudice; the possibility of multiplicity of suits, which the defendant insists we should have; and the adequacy of representation of the rights of applicants for intervention by existing parties, and the existing parties do not allege the same veterans status as is alleged by the intervening plaintiffs.

[*Same Questions Presented*]

It appears without question that in this case the essential question of law is the same with regard to both the original plaintiffs and the intervenors. The basic question involved in this case, assuming the eligibility of all or some of the plaintiffs, is whether or not these defendants are following a stated policy or custom of racial discrimination contrary to the Civil Rights Acts which have been quoted. The fact questions also appear to be similar and probably provable in large part by the same witnesses, other than the parties, themselves, testifying as to eligibility. It is questionable whether the defendants would find it necessary to call any additional witnesses if these plaintiffs are permitted to intervene; and even the defendants have not suggested that they would be prejudiced, that there would be any delay, or that there should be any other objections. They insist only that we should have additional lawsuits.

It is possible that the interest of the applicants for intervention might in some degree be prejudiced by a determination of the action against the original plaintiffs, due to the failure of the original plaintiffs to have veterans preference, if these plaintiffs are not allowed to intervene. This issue makes it somewhat doubtful that the original plaintiffs could adequately represent the interest of these intervening plaintiffs. It seems obvious that denial of the right to intervene could only result in a multiplicity of suits to decide the same question under the Civil Rights Acts as to whether or not these defendants are following a policy of racial discrimination.

[*Intervention Controlled By Court*]

Clark v. Sandusky, 205 F.2d 915, a decision of the Seventh Circuit in 1953, holds that Rule 24 governing intervention should be liberally construed so as to avoid multiplicity of suits. Permissive intervention has been generally held to be a matter largely within the discretion of the district court.

It has been stated by the Court of Appeals for

the Sixth Circuit, in American Federation of Labor v. Reed et al., 180 F.2d 991, at page 998:

> "Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court."

Shipley et al. v. Pittsburgh & L.E.R. Co., 70 F.Supp. 870, a decision in Pennsylvania, 1947, was a spurious class action filed by one Shipley on behalf of himself and others to recover compensation. A motion to intervene on behalf of fifty-eight additional plaintiffs was granted. Later a motion was filed on behalf of twenty-nine more plaintiffs. The court reconsidered its prior decision, in which it had held that it had jurisdiction under the Railway Labor Act, so that the intervenors need not satisfy the diversity and jurisdictional amount requirements. In its opinion, the court ruled that it did not have jurisdiction under the Railway Labor Act, but that the applicants for intervention should be allowed to intervene, nevertheless, because it was a spurious class action and there were questions of law and fact common to all those seeking to intervene and the original plaintiff, even though some questions of fact might differ as to various individuals.

So far as we can determine, there are no authorities directly in point on the issue involved in this case.

We are satisfied that intervention should be granted where, after considering all of the circumstances, it seems more advantageous to all concerned to permit intervention than to deny it; and it in the present case the court is satisfied that the circumstances are such that intervention should be permitted.

As to the motion for leave to amend the intervenors' complaint, under the rules that is a matter entirely within the discretion of the court. I call your attention to 7 Cyclopedia of Federal Procedure, Section 24.38. In the exercise of that discretion, the court feels that there can be no prejudice of any kind to these defendants, who have not answered, if the intervening plaintiffs are permitted to amend their complaint, even though the amendment brings before the court questions of fact somewhat different from those raised in the original complaint and in the original intervenors' complaint because it involves a housing project which is not basically for low-income groups.

It is the opinion of this court that the class in this case is composed of a group of Negro citizens who claim to be qualified for residence in certain housing projects, public housing projects, operated by these defendants, and who further claim, through the original plaintiffs and the intervening plaintiffs, that they are barred from such occupancy by the policy followed by these defendants to discriminate between Negro citizens and white citizens.

The motion to intervene is granted.

The motion to amend the intervenors' complaint is granted. Orders may be entered accordingly.

[OPINION OF DECEMBER 21, 1956]

This is a class action in which plaintiffs and intervening plaintiffs bring suit for the purpose of obtaining a declaration and determination of their rights in connection with certain alleged segregation according to race which plaintiffs claim exists in public housing facilities owned and/or operated by the defendants. Plaintiffs also pray for a permanent injunction to restrain the defendants from continuing such segregation; from denying preference to the plaintiffs and other negro citizens as required by Title 42 U.S.C. §§ 1410(g), 1415(8)(c);[1] from refusing negro veterans admission to a housing project limited to occupancy by veterans; from requiring a statement of race on the application blanks used by the defendants.

The action is instituted pursuant to 28 U.S.C.

1. *Title 42 U.S.C. §§ 1410(g)*
"Every contract made pursuant to this chapter for annual contributions for any low-rent housing project shall require that the public housing agency, as among low-income families which are eligible applicants for occupancy in dwellings of given sizes and at specified rents, shall extend the following preferences in the selection of tenants:
"First, to families which are to be displaced by any low-rent housing project or by any public slum-clearance, redevelopment or urban renewal project, or through action of a public body or court, either through the enforcement of housing standards or through the demolition, closing, or improvement of dwelling units, or which were so displaced within

§ 1331.[2] Also 28 U.S.C. § 1343(3).[3] And 42 U.S.C. §§ 1981-83.[4]

Plaintiffs also rely upon the United States Housing Act of 1937, (42 U.S.C. § 1401-33 as amended) and the Fourteenth Amendment to the Constitution of the United States, which reads in part as follows:

> Section 1. ". . . No state shall . . . deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Pursuant to 28 U.S.C. § 2201 plaintiffs seek a declaratory judgment on behalf of themselves and all persons in like circumstances to determine the following issues.

(A) Whether defendants may lawfully segregate plaintiffs and other negroes by race in public housing facilities in Benton Harbor, Michigan;

(B) Whether defendants may lawfully refuse to admit plaintiffs and others in like circumstances to certain public housing because they are members of the negro race;

(C) Whether defendants may lawfully refuse to extend to plaintiffs and others in the same circumstances the benefits of certain statutory privileges with regard to public housing as provided by 42 U.S.C. §§ 1410(g), 1415(8)(c) because the plaintiffs are members of the negro race;

(D) Whether the defendants may segregate members of the negro race and limit their occupancy of public housing to specific facilities;

(E) Whether defendants may lawfully classify the plaintiffs as negroes and each of them on that basis for any purpose with respect to public housing;

(F) Whether defendants may lawfully require applicants for admission to public housing to state their race on the application blanks;

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three years prior to making application to such public housing agency for admission to any low-rent housing: *Provided,* That as among such projects or actions the public housing agency may from time to time extend a prior preference or preferences: *And provided further,* That, as among families within any such preference group first preference shall be given to families of disabled veterans whose disability has been determined by the Veterans' Administration to be service-connected, and second preference shall be given to families of deceased veterans and servicemen whose death has been determined by the Veterans' Administration to be service-connected, and third preference shall be given to families of other veterans and servicemen;

"Second, to families of other veterans and servicemen and as among such families first preference shall be given to families of disabled veterans whose disability has been determined by the Veterans' Administration to be service-connected, and second preference shall be given to families of deceased veterans and servicemen whose death has been determined by the Veterans' Administration to be service-connected,"

Title 42 U.S.C. § 1415(8)(c)

"In the selection of tenants (i) the public housing agency shall not discriminate against families, otherwise eligible for admission to such housing, because their incomes are derived in whole or in part from public assistance and (ii) an initially selecting families for admission to dwellings of given sizes and at specified rents the public housing agency shall (subject to the preferences prescribed in section 1410(g) of this title) give preference to families having the most urgent housing needs, and thereafter, in selecting families for admission to such dwellings, shall give due consideration to the urgency of the families' housing needs; and"

2. *28 U.S.C. § 1331*

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceed the sum or value of $3000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

3. *28 U.S.C. § 1343(3)*

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1)———

(2)———

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

4. *42 U.S.C. §§ 1981-1983*

"*§ 1981* All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"*§ 1982* All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

"*§ 1983* Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(G) Whether defendants may refuse to admit those of the plaintiffs who are otherwise qualified as veterans to a veteran's housing project controlled by the defendants because the plaintiffs are negroes.

The Court has previously ruled on the right of the intervening plaintiff to intervene in the action and has determined that the original plaintiffs and the intervening plaintiffs are properly members of a class as required by Rule 23(a)(3) of the Federal Rules of Civil Procedure, and it is not necessary to discuss this matter in this opinion.

The matter is now before the Court on plaintiffs' motion for a summary judgment as provided by Rule 56 of the Federal Rules of Civil Procedure. Oral argument has been had upon the motion and it has been stipulated by all counsel that the Court may take cognizance of the deposition of defendant's agent taken on or about December 14, 1955, and that the Court may further take cognizance of all files, records and exhibits introduced by the plaintiffs on the taking of that deposition, in determining the motion for summary judgment now under consideration.

It is the theory and claim of the defendants that they do not follow a *policy* of restricting occupancy according to race but they admit that they do so by custom and usage which would appear to bring the matter squarely within the provision of 28 U.S.C. § 1343(3).

[*Facts*]

Defendants operate two low-rent public housing projects in the City of Benton Harbor, Michigan. One is known as Mich 10-1 and according to defendant's agent is by custom and usage limited to occupancy by persons who are white. The other unit is known as Mich 10-2 and according to the custom and usage of the defendants is limited to occupancy by persons who are negroes. The defendants are also the operators of a public housing project which is available for occupancy by veterans of United States Wars. Admittedly, no negro veteran has ever been admitted to the veteran's project by the defendants.

According to the defendants it would appear that there are two issues of fact, one whether the plaintiffs or any of them are adult negro citizens eligible for admission to the public housing projects above referred to, and the other issue is whether the plaintiffs have been denied housing solely on the basis of race or color. While not admitted in the pleadings the eligibility of the intervening plaintiffs, Morgan and Herd, is admitted in the deposition of defendent's agent T. H. Agens. Therefore the only remaining issue of fact would be whether the plaintiffs or any of them have been denied housing solely on the basis of their race or color. It appears without question from the deposition of Mr. Agens and the exhibits attached thereto that white persons less qualified for housing than some of the plaintiffs were admitted to white housing prior to the admission of some of the plaintiffs to any housing and at a time when plaintiffs had made application for housing.

It appears that plaintiff, Melvin Herd, applied for housing on March 3, 1955, that he is an honorably discharged veteran, that he was admitted to Mich 10-2 (negro housing) on April 26, 1955.

It appears that Idell Craig, a white person, applied for admission on February 24, 1955, reapplied on March 23, 1955, and was admitted on March 25, 1955. Idell Craig is not entitled to veterans preference, she was admitted to Mich 10-1 (white housing).

From the deposition it appears that there were others admitted to white housing after Herd had applied and before he was admitted who were less eligible than Herd. The same is true of plaintiff Morgan who made application for housing on February 3, 1955, and who is an honorably discharged veteran.

It is the theory and claim of the defendants in argument that none of the plaintiffs or others in like circumstances had ever made application for housing in the veterans unit. However, admittedly, white persons who made application for housing in Mich 10-1 were admitted to veterans housing without other application.

While it is not specifically stated in the pleadings or the depositions, the Court is satisfied that the defendants would not have accepted an application for housing in the veterans project from a negro.

As to the original plaintiffs the Court is satisfied that the objections raised by the defendants were in most cases well taken and that none of the original plaintiffs could have been admitted under the statute and rules. However, the Court is satisfied that the intervening plaintiffs, Morgan and Herd, were clearly eligible

for housing and that their housing was denied or delayed solely because of the fact that they were negroes.

[*Effect of Brown Decision*]

The question of segregation in public housing has not yet been before the Supreme Court of the United States. However, this Court is satisfied that an examination of Brown et al v. Board of Education, 1954, 347 U.S. 483 is sufficient to answer any and all questions relative to segregation of persons because of membership in the negro race whether it be in public schools or in public housing. The Supreme Court has expressed its opinion by stating that segregation of children in public schools solely on the basis of race, deprives those children of equal opportunities for education, makes second class citizens of them, and is therefore unconstitutional. If segregation in education is *per se* a denial of equal protection then certainly segregation in public housing solely on account of race is likewise a denial of the equal protection of the laws.

It is only necessary to quote from the opinion of the Court of Appeals for the 6th Circuit in The Detroit Housing Commission v. Lewis, et al, 226 F.2d 180, for the determination of the rights of the parties to this action. Speaking through the Honorable Florence Allen, Circuit Judge, the Court said:

> "While the recent decisions of the Supreme Court of the United States in the 4 education cases, Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 349 U.S. 294, 75 S.Ct. 753, in principle support the conclusion of the District Court that the practices of The Detroit Housing Commission violate the Fourteenth Amendment and the cited sections of the United States Code, plaintiffs' rights are not based solely upon education decisions. They have long been established in the adjudications of the Supreme Court and of the lower federal courts. Here plaintiffs are denied the right to lease housing facilities provided by public funds under conditions equal to those imposed upon applicants from white families. In Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, decided in 1917, the Supreme Court considered an ordinance of the City of Louisville which forbade the occupation by a Negro of a residence in a block where the greater number of residences were occupied by white persons. The Supreme Court pointed out that this interdiction was based 'wholly upon color; simply that and nothing more', 245 U.S. at page 73, 38 S.Ct. at page 18, and held that the occupancy and, necessarily, the purchase and sale of property of which occupancy is an incident cannot be inhibited by the State or one of its municipalities, solely because of the color of the proposed occupant of the premises. As the Supreme Court said, 245 U.S. at page 77, 38 S.Ct. at page 19, with reference to the Fourteenth Amendment:
>
> ' "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" '
>
> "This decision was followed without opinion in Harmon v. Tyler, 273 U.S. 668, 47 S.Ct. 471, 71 L.Ed. 831, and in City of Richmond v. Deans, 281 U.S. 704, 50 S.Ct. 407, 74 L.Ed. 1128. In Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, decided in 1948, the Supreme Court held that private agreements to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes do not violate the Fourteenth Amendment. But the court declared that it is a violation of the equal protection clause of the Fourteenth Amendment for the state courts to enforce such agreements. To the same effect is Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, decided in 1953. See also Dawson v. Mayor, 4 Cir., 220 F.2d 386, which holds that the ruling of Brown v. Board of Education of Topeka, supra, should be extended to public recreation."

In conclusion the Court is satisfied from the file that no issue of fact remains in this case. This Court is satisfied that the defendants have as a matter of custom and usage discriminated against members of the negro race and have

segregated negroes and whites in public housing projects, including the veteran's project, which are under the jurisdiction of the defendants.

[*No Trial Necessary*]

The Court is further satisfied that it would be a complete waste of time and money to require a trial in this case. This Court is satisfied (a) that the defendants may not segregate plaintiffs and others by race in public housing; (b) that the defendants may not refuse to admit plaintiffs to public housing because they are negroes; (c) that the defendants may not refuse to extend to plaintiffs the benefits of §§ 1410(g) and 1415(c) of Title 42 U.S.C.; (d) that the defendants may not segregate the plaintiffs and others within the project to which they are admitted; (e) that the defendants may not lawfully classify plaintiffs and others on the basis of race for any purpose; (f) that the defendants may not lawfully require plaintiffs or any other persons to state their race when applying for admission to public housing, and (g) that defendants may not refuse to admit negroes to the veteran's housing project under the control of the defendants.

Therefore, the plaintiffs may have a summary judment as prayed for in their motion.

Plaintiffs may submit a form of judgment and form of injunction upon notice to the defendants.

JUDGMENT

In accordance with the opinion of this court on the 21st day of December 1956 on the plaintiffs' motion for summary judgment,

It is ORDERED, ADJUDGED and DECREED as follows:

1. That the defendants, Benton Harbor Housing Commission, a body corporate; D. C. Cook, E. W. Butzbaugh, D. Saggitt, E. H. Ormister and B. W. Sheffer, members of the Benton Harbor Housing Commission: T. Agens, Director-Secretary, Benton Harbor Housing Commission, their servants, agents, assistants and employees, and those who might aid, abet and act in concert with them, are hereby permanently enjoined and restrained from:

a) Segregating plaintiffs and others by race in public housing.

b) Refusing to admit plaintiffs and others similarly situated to public housing because they are Negroes.

c) Refusing to extend to plaintiffs and others similarly situated the benefits of §§ 1410(g) and 1415(8)(c) of Title 42, United States Code.

d) Segregating plaintiffs and others similarly situated within the projects to which they are admitted.

e) Classifying plaintiffs and others similarly situated on the basis of race for any purpose.

f) Requiring plaintiffs and other persons to state their race when applying for admission to public housing.

g) Refusing to admit Negroes to the veterans housing project under the control of the defendants.

2. That the costs are taxed against the defendants for which execution may issue.

Done and ordered this 21 day of January, 1957.

PUBLIC ACCOMMODATIONS
Beauty Salons—Washington

Ola M. BROWNING and John P. Browning v. SLENDERELLA SYSTEMS OF SEATTLE

Superior Court, King County, Washington, April 5, 1957, No. 493710.

SUMMARY: The plaintiffs, husband and wife, brought a suit for damages in a Washington State Court against the operator of reducing salons. The suit was brought under the Washington Public Accommodation Law (see 2 Race Rel. L. Rep. 461) and stated that the defendant

had refused to serve the wife, a Negro, in one of its reducing salons solely on the basis of her race or color. At the trial the court found the alleged discrimination to have been established and awarded the plaintiffs $750 damages.

JAMES, J.

FINDINGS OF FACT
CONCLUSIONS OF LAW

THIS CAUSE coming on for trial on March 20, 1957, the plaintiffs being present and represented by her attorney, James E. McIver, of the law firm of Walthew, Warner & Keefe, the defendant corporation being represented by William J. Madden of the law firm of Bayley, Fite, Westberg, Madden & Goodin, and all parties having announced their readiness for trial; whereupon the plaintiff adduced sworn testimony and rested; whereupon the defendants challenged the legal sufficiency of the evidence to warrant its submission to the court, and said motive having been denied; the defendants thereupon adduced sworn testimony and rested, and thereafter the plaintiff adduced sworn testimony on rebuttal; and all parties having concluded their respective cases and rested; the Court having listened to argument of counsel and being fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

That the plaintiffs are husband and wife and now are and at all times mentioned have been residents of King County, Washington.

II

That the defendant owns and operates a business located at 1518 6th Avenue, Seattle, Washington, known as the Slenderella Systems of Seattle, a corporation, and that said corporation was at all times herein mentioned engaged in a public accommodation by operating a reducing salon for the purpose of slenderizing courses for women.

III

That the defendant-corporation advertises to the general public via the radio and newspaper media, the particular services rendered; that pursuant to said advertisement, the plaintiff, Ola M. Browning, on Friday, March 2, 1956, telephoned the defendant and was given an appointment for Monday, March 5, 1956, at 10:30 A.M.; that the plaintiff arrived at the Slenderella Salon at approximately 10:25 A.M.

IV

That the plaintiff waited from 10:30 A.M. until approximately 12:15 P.M. for service, and upon inquiry to one of the employees as to why she could not be served, the plaintiff was referred to Manager, who stated to the plaintiff that up until that time she did not service any colored folks either at Northgate or in the Sixth Avenue Store.

V

That the Manager of the Salon did not at any time after the plaintiff had waited nearly two hours, state when she would serve the plaintiff.

VI

That on March 5, 1956, the plaintiff, Ola M. Browning was discriminated against on account of her race or color.

VII

That the establishment known as the Slenderella System of Seattle, a corporation, and its business thereof, is within the meaning of the Public Accommodation Law, R. C. W. 9.91.010.

VIII

From the foregoing Findings of Fact, the Court makes and enters the following:

CONCLUSIONS OF LAW

I

That the Court has jurisdiction over the plaintiff and the defendant and over the subject matter of this action.

II

That on March 5, 1956, the plaintiff, Ola M. Browning was wrongfully discriminated against by the defendant's duly authorized agents.

III

That the plaintiff is entitled to a judgment in

the amount of Seven Hundred and Fifty Dollars ($750.00), together with her costs and expenditures herein to be taxed.

DONE IN OPEN COURT this 5th day of April, 1957.

JUDGMENT

The above-entitled cause came on regularly for trial on the 20th day of March, 1957, before the Court, sitting without a jury, James E. McIver appearing for the plaintiffs, and William J. Madden, appearing for the defendant, and evidence both oral and documentary having been introduced and the cause submitted for decision, and the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised in the premises,

NOW THEREFORE, in accordance with said Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs do have and recover of and from the defendant-corporation the sum of Seven Hundred and Fifty Dollars ($750.00), with interest thereon at the rate of 6% per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in said action.

DONE IN OPEN COURT this 5th day of April, 1957.

PUBLIC ACCOMMODATIONS
Private Clubs—New York

CASTLE HILL BEACH CLUB, Inc. v. Ward B. ARBURY et al.

Court of Appeals, New York, April 11, 1957, 142 N.E.2d. 186.

SUMMARY: Based on the complaint of a Negro woman that she was denied accommodation at the Castle Hill Beach Club because of race, the New York State Commission Against Discrimination, after hearings, issued a cease and desist order against the Club. The Club petitioned the Supreme Court, Bronx County Special Term, Part I, to annul the order of the Commission on grounds that it was a private club and not a "place of public accommodation." The Commission filed a cross motion for enforcement of its order. The Court found that the Beach Club was, in fact a "place of public accommodation" within the term of the statute and denied the motion of the petitioner. 142 N.Y.S.2d 432, 1 Race Rel. L. Rep. 186 (1955). (See also 144 N.Y.S.2d 747, 1 Race Rel. L. Rep. 382 [1955]). The Appellate Division affirmed but modified the order. 150 N.Y.S.2d 367, 1 Race Rel. L. Rep. 682 (1956). On appeal the New York Court of Appeals affirmed the decision of the Appellate Division.

CONWAY, Chief Justice.

On December 14, 1953 the State Commission Against Discrimination commenced hearings on the complaint of Anita Brown, a Negro woman, against the petitioner, Castle Hill Beach Club, Inc., a membership corporation which operates a bathing and recreation park 16 acres in size, in Bronx County, accommodating about 13,000 persons on a seasonal membership basis and over 10,000 persons per season on a daily guest admission basis. Mrs. Brown complained that petitioner was operating a place of public accommodation and, in refusing her season locker rights, had discriminated against her because of her color. After extensive hearings, the commission upheld the complaint and made an order directing the membership corporation to cease and desist from the unlawful discriminatory practice and requiring the membership corporation to take stated affirmative action. The order of the commission was modified by the Appellate Division.

On this appeal we are called upon to determine (1) whether, at the time of the commission of the alleged act of discrimination, the member-

ship corporation was operating a place of public accommodation, resort or amusement, within the meaning of section 40 of the Civil Rights Law and subdivision 2 of section 292 of the Executive Law; if it were (2) whether there is support in the record for the finding of the commission that the membership corporation discriminated against the complainant because of her color, and finally (3), whether the membership corporation was denied a fair hearing before the commission and its constitutional rights infringed by that body. We are agreed that question (1) and (2) must be answered in the affirmative and that question (3) must be answered in the negative.

[*History of Admissions Policy*]

From 1928 through 1950, Castle Hill Estate, Inc., a stock corporation, owned the facilities in question and operated them as a commercial enterprise. During the period from 1945 through 1951, William L. Sayers, an attorney, and members of his and his deceased brother's family owned all of the stock and were the officers and directors of the corporation. From 1928 through 1946 admission to the facilities could be gained on a season or a daily basis. In 1947 the admission policy was changed. Admissions on a daily basis were eliminated and the facilities were made available only to those paying a season charge and their guests. Concededly, the facilities were open to the free and unrestricted use of the public from 1928 through 1950 and during those years the park was operated as a place of public accommodation. Since there were no daily admissions after 1947 it is clear that the membership corporation recognizes that daily admissions is not the criterion which determines the public or private character of a place of accommodation—a place may be public though a weekly, monthly or seasonal basis for charging for admission is employed. That brings us to the crucial question of whether, with the formation of the membership corporation in 1950, the facilities were converted from a public to a private accommodation. Such is the claim of the membership corporation. The commission and the courts below have held otherwise.

[*Terms of Lease*]

In November of 1950 Castle Hill Estate, Inc., as landlord, leased the premises to the newly formed membership corporation for the year 1951. Thereafter, in August of 1951, Castle Hill Estate, Inc., conveyed title to a newly created stock corporation, Bronx-City Island Realty Corporation, which thereupon became the membership corporation's new landlord. William L. Sayers and family were the sole stockholders and officers of Bronx-City Island Realty Corporation. The 1951 rental stipulated in the lease between Castle Hill Estate, Inc., and the membership corporation (A) $50,000 *or* (B) the gross annual receipts less taxes and operating expenses, at the *landlord's* option. Under option (B) the lease set forth a schedule of amounts or rates that the landlord could ask of the tenant as rent for the use of bath-houses. The lease was extended for two years by Bronx-City Island Realty Corporation upon the same terms and conditions, except that during 1952 and 1953 the rates for the various types of season bath-house occupancy were slightly higher. During all three years the landlord exercised option (B), thus earning for its stockholders the very same sum which it would have earned for them had it been operating the facilities directly, as had been the method of operation prior to the formation of the membership corporation. By its lease, Castle Hill Estate, Inc., reserved the right to approve all checks and drafts on any of the membership corporation's funds on deposit. This, of course, demonstrates that the landlord-lessor possessed a large, and, in our judgment, an unusual measure of control over the financial affairs of its lessee, the membership corporation. When the membership corporation opened its checking account, checks were authorized to be signed by any two or four named persons, three of whom were officers of Castle Hill Estate, Inc. The fourth person was the president of the membership corporation who had previously been an officer of Castle Hill Estate, Inc., and its general manager. Thus, it will be seen that it was impossible for the lessee to draw a check without the approval of at least one of the lessor's officers. The moneys deposited in this bank account represented deposits made in 1950 with Castle Hill Estate, Inc., by persons desiring season bath-houses for the 1951 season. However, the members of the public who made such deposits were not consulted or advised as to the transfer of their funds from the stock corporation, Castle Hill Estate, Inc., to the membership corporation.

[*Officers of Corporation*]

The season member rates during 1950 when Castle Hill Estate, Inc., operated the facilities were the same as the season member rates in 1951 when the membership corporation operated them. The facilities were substantially the same before and after the formation of the membership corporation. Prior to the creation of the membership corporation three men were employed by Castle Hill Estate, Inc., in managerial capacities, and these men were continued as managers by the membership corporation. One of these had been an officer of Castle Hill Estate, Inc. All three were officers and directors of the membership corporation and were on the Members' Governing Committee.

From 1928 through 1951, Castle Hill Estate, Inc., the original owner and operator of the park and the membership corporation's first landlord, occupied the same two offices as those occupied by the membership corporation—at the site of the park and in the law office of William L. Sayers. Since its organization in 1951 and through 1953 the new landlord occupied the same offices as those occupied by the membership corporation. Since is organization and through 1953, the books of the membership corporation were kept at said two offices and the membership corporation had employees perform their services at said two offices.

[*Availability of Facilities*]

After the formation of the membership corporation the facilities were available only to "seasonal club members" and their guests. But that fact is quite immaterial in determining whether the membership corporation was operating a public or private place of accommodation for, prior to the formation of the membership corporation, when the park was concededly a place of public accommodation, the facilities were likewise available only to those paying a season charge and their guests. As we see it, our inquiry must be more searching. We think that due consideration must be accorded to (1) the means by which one obtains a membership and (2) the rights which flow from the procurement of a membership.

Prior to 1950 when the park was concededly operated as a place of public accommodation any member of the general public could obtain a membership, if such were available,—which entitled him to use the facilities—by paying the prescribed season rate. (At the end of each summer the membership terminated automatically.) After 1950 when the facilities were operated by the membership corporation, anyone who had previously been a season member at the park could likewise obtain a membership, if such were available,—which entitled him to use the facilities—by simply paying the prescribed rates. A person who had not previously been a season member had, in addition, to fill out an application. Under the by-laws the members' governing committee, consisting of six persons, "shall examine and take action upon all applications for seasonal membership." As a matter of fact and procedure, however, applicants were taken in on their face value, without interview, investigation or sponsorship, upon the recommendation of either of two members of the members governing committee. The recommendation was given unless the applicant was known to be a disorderly person. The names of seasonal members were not posted on a bulletin board and no notification of any kind with respect to said applicants was given to the seasonal members either before or after their approval. Thus, it would appear that the applicant performed, in effect, a meaningless act when he completed the application form, for his application was approved as a matter of course. At the end of each summer the membership which one obtains, with or without having filled out the application form, terminates automatically. The patrons of the facilities, both before and after the formation of the membership corporation, were not limited to any geographical area; were not limited to any occupational category; were not limited to any age group; were not limited as to number, other than the capacity of the facilities, and were not limited to any social or economic status. Indeed, the record fails to reveal that they were limited in any way. Stated conversely, in reality the facilities—both before and after the formation of the membership corporation—were open to all, other than persons known to be disorderly persons.

[*Powers of Exclusion*]

The membership corporation—which it must be remembered was organized by an attorney who, presumably, was aware of the power of exclusion possessed by a place of resort or amusement—urges that it was created as a membership corporation in order to keep out of the

park certain undesirable types of persons, e.g., petty thieves, "roughnecks" and troublemakers and that so long as Castle Hill Estate, Inc., owned and operated the park as a "public place" it could not exclude such persons. However, this court pointed out in Madden v. Queens County Jockey Club (296 N. Y. 249) that places of amusement and resort as distinguished from those engaged in a public calling, such as innkeeper or common carrier, enjoy an absolute power to exclude those whom they please, subject only to the legislative restriction that they not exclude one on account of race, creed, color or national origin. In the Madden case this court upheld the right of a race track to exclude "Owney" Madden even though the exclusion was without good cause. Manifestly, therefore, it was not necessary for the Sayers family to form a membership corporation to be possessed of the right to exclude disorderly persons. As a matter of fact, both before and after the formation of the membership corporation the management exercised the power of exclusion by denying seasonal membership to persons known to be disorderly persons. As the commission has held, the asserted reason for forming the membership corporation cannot be accepted as the true reason for forming it, in view of the facts (1) that the management had exercised the power of exclusion both before and after the formation of the membership corporation and (2) that the membership corporation took no steps whatever to effectuate the purpose for which it assertedly was formed. That is, although it is claimed that the membership corporation was formed to enable the management to exclude undesirable persons, no effort was made to screen applicants—there was no interview, no investigation and no sponsorship. Applicants were accepted as a matter of course. All that the membership corporation did in the way of making certain that only desirable persons were admitted was to exclude persons known to it to be undesirables. As we have said, the management had done the same thing prior to the formation of the membership corporation.

[*Control Not In Members*]

One who became a seasonal member after the formation of the membership corporation had no more say on matters affecting the management, affairs, finances, property, business or policies of the membership corporation than a seasonal member had on such matters when the enterprise was conducted by the stock corporation. The Sayers family controlled and managed the facilities both before and after the formation of the membership corporation. Under the terms of the by-laws, seasonal members are not entitled to vote on any amendment or repeal of a by-law or on any new by-law "now or hereafter adopted." The by-laws were prepared by William L. Sayers and from the time the membership corporation was organized in 1950 through 1953, said by-laws have been kept in Sayers' law office. The seasonal members were never afforded the opportunity of approving or disapproving the by-laws. Copies of the by-laws were never distributed to the seasonal members and no copies were ever posted on the bulletin board at the park.

[*Telephone Listings*]

The name of the membership corporation, Castle Hill Beach Club, Inc., was substituted in the listing under "Bathing Beaches—Public" in the Bronx Classified Telephone Directory, in the years 1951, 1952 and 1953 for the name of its predecessor, Castle Hill Bathing Park, with the same address and telephone number. In those years, the Bronx Classified Telephone Directory contained a heading entitled "Clubs" under which about 100 clubs were listed. During that period the membership corporation was not listed under that heading. On various pages throughout the directory the legend appeared: "Will you please check your listing in this directory. If not correct please call the Telephone Business Office."

Although the membership corporation's three officers testified at the hearing, none of them denied knowledge of the above-stated listings. It seems reasonable to assume that the change made in the directory was made at the direction of some authorized representative of the club. It seems to us that it is common knowledge, and that we may take judicial notice of the fact, that a telephone listing in a classified directory does not serve only one purpose—that of enabling interested persons to communicate by telephone. The classified directory—or the "Red Book" as it is commonly called—lists telephone numbers according to the nature and character of the business or service offered by those whose numbers are listed. This is not solely for the purpose of enabling interested persons to communicate by telephone. When one uses the Red Book he doesn't only look for a telephone num-

ber and it wasn't intended that he should. Indeed, he may not look for a telephone number at all, but, rather, for an address.

During the years 1951, 1952 and 1953, the Bronx Red Book announced, to all who chose to look, that the Castle Hill Beach Club was a public bathing beach. Thus, in our opinion, all members of the public taking note of the listing could properly consider themselves invited to use the facilities. Any member of the general public, having noted this listing and having gone to the park would find that admission for the season could be gained by merely paying the requisite charge for a season membership and completing a simple membership application form. His application had to be approved by the members governing committee, but, as we have said, such approval was given as a matter of course to those not known to be disorderly persons.

[*License Surrendered*]

Not until the commission had initiated the investigation of the petitioner did the membership corporation seek to surrender its public bathing establishment license, which it had applied for and received from the License Department of the City of New York in 1951, 1952 and 1953. The membership corporation's predecessor, Castle Hill Estate, Inc., had applied for and received the same type of license during each of the 23 years from 1928 through 1950. On March 31, 1953, when the alleged act of discrimination occurred; on April 6, 1953, when the complaint was filed; and on May 5, 1953, when the commission's field representative questioned the membership corporation's representatives about its licenses, the membership corporation had a public bathing establishment license.

The license which the membership corporation applied for and obtained from the State Liquor Authority in order to sell beer in its bar and cafeteria in 1951 and 1952 was a commercial beer license, the same kind of license held by its predecessor, Castle Hill Estate, Inc., when it owned and operated the park, and not a club license. In 1953, the lessee of the cafeteria and bar applied for and obtained a similar commercial beer license for said cafeteria and bar and not a club license.

Since its organization and through 1953, the membership corporation had paid the New York City gross business tax, just as any ordinary commercial business operated in the city of New York is required to do, and, the membership corporation has no ruling exempting it from Federal income taxes, despite the fact that a bona fide club organized and operated for pleasure, recreation and other nonprofit purposes is entitled to such exemption under the Internal Revenue Code (U. S. Code, tit. 26, § 101, subd. [9]).

[*Day Camp Use*]

During each summer season, the Castle Hill Day Camp, located across the street from the park, utilizes the membership corporation's pool and park facilities on a six-day per week basis with the knowledge and consent of the membership corporation and for which it is paid. The several hundred patrons of the day camp who are admitted to and utilize the membership corporation's facilities are members of the public and are not required to be either seasonal members or guests of members of the membership corporation.

The commission has found, and the record supports the conclusion, that the creation of the membership corporation was motivated by apprehension of the possible effect which the presence of Negroes might have on the profit-making potential of the recreational park. The membership corporation's president and general manager did not deny the statement attributed to him by the commission's field representative, "Our only reason for not wanting to admit negroes is" that "we are scared to death to admit them for fear of the untoward results which might follow their admission."

It may be that the telephone listing, etc., as isolated facts, do not justify the conclusion that the membership corporation was a mere sham designed to conceal the truly public nature of the enterprise. But, in our judgment, the record, considered as a whole, compels that conclusion. The various aspects of a plan or scheme, when considered singly, may very well appear innocent. The true nature of the plan or scheme is revealed only when the various aspects are viewed as a totality. Such is this case.

Lastly, we find that the hearing conducted by the commission was fair and deprived the membership corporation of no constitutional right.

The order of the Appellate Division should be affirmed, with costs.

DESMOND, DYE, FULD, FROESSEL, VAN VOORHIS and BURKE, JJ., concur.

Order affirmed.

EMPLOYMENT
Fair Employment Laws—Minnesota

CITY of SAINT PAUL v. F. W. WOOLWORTH COMPANY

Municipal Court, City of St. Paul, Minnesota, November 30, 1956.

SUMMARY: An ordinance of the city of St. Paul, Minnesota, enacted January 30, 1955 [printed in this issue at p. 702, *infra*], makes the questioning of any applicant for employment concerning his race, religion, national origin or ancestry an unlawful employment practice. A Negro applicant for employment with the F. W. Woolworth Company in that city brought a complaint before the city Fair Employment Practice Commission alleging that an employment interviewer had entered the notation "Negro" on his application and he had been denied employment because of his race. Following unsuccessful conciliation attempts by the Commission, suit was brought by the city in a municipal court against the company. The court, PLUNKETT, J., found that the making of such a notation was a violation of the ordinance. On February 5, 1957, the court imposed sentence of $100 fine or ten days imprisonment on the company and suspended the sentence. Part of the proceedings in open court are printed below:

The Court: Gentlemen, we realize that this is a matter of great importance and there has been a lot that we have had to decide. I am very thankful for the briefs that were submitted by both sides concerning this matter.

I think the first issue we should dispose of is the fact issue in this case and I think the facts are rather undisputed. What happened was that this man Cunningham made an application at the defendant's store and during the course of the interview with the personnel girl at the store, the personnel girl made some notation and in some type of notebook of her own or a company notebook which was for company purposes no doubt, wherein she recorded the fact of the man's race.

The first legal issue is the matter of vicarious liability which was decided by the Court at the time of trial. The Court at the time of trial denied the motion of the defendant on this issue and no further study has been made on this point.

[*Coverage of Ordinance*]

Now, we get to the next issue and that is whether or not the Ordinance of the City of Saint Paul includes the fact issue as decided. I will just read the relevant portions. "It shall be an unfair labor practice with respect to employers et cetera to include in any application form or biographical statement relating to employment any question or statement designed to elicit or record information concerning the race, religious creed, color, national origin or ancestry of the applicant."

Now, that is the pertinent provision of the Ordinance and the portion of the Ordinance that the defendant is charged with violating. The main problem that arises, I believe, is because of the use of the many disjunctives in the Ordinance. I think that the use of the many disjunctives in the Ordinance was for the purpose of attempting to draft something to make it all-inclusive and because of the use of these disjunctives the exact meaning is not readily apparent.

It is a principle of criminal law—and this is a criminal proceedings—that a law should be so clear that a person can know with reasonable certainty that he has or has not violated the Ordinance. With this principle in mind the Court has made inquiry into the exact meaning of the Ordinance involved. I think that perhaps the matter could be clearer as evidenced in some other States and what they have done in similar types of legislation. I have not been able to make comparisons with other ordinances except one because of the inability to obtain copies of them. For instance the Pennsylvania Statute. Its relevant portions read: "It shall be unlawful practice to make or keep a record of or use any form concerning the race, color, national origin," et cetera. It should be noted that this is very precise and the statute says to make or keep a record.

[*Other Laws Compared*]

Now, Mr. Fenlon, I believe you cited several other states in your brief, Michigan and Rhode Island which are somewhat similar. Now, of course we have the problem in our own Ordi-

nance perhaps of the double meaning or the intent of the Ordinance to cover two situations. The more I looked at the other Ordinances and the other statutes concerning this problem I think that the intent here is rather clearly spelled out and to the extent that in spite of the use of the many disjunctives here it was intended to cover two situations. So I am inclined to agree with the Plaintiff's position in his brief wherein the statement is made, "Because of these disjunctives you can, after careful examination, determine that this phrase means two things; that it shall be an unfair practice et cetera to include in any application form relating to employment any question designed to elicit information concerning race, etc., or it shall be an unfair practice to include in any biographical statement relating to employment any statement designed to record information concerning the race et cetera. This is taking out the various disjunctives and showing that there are two situations intended to be covered. Maybe it would be better to have set these out in two separate statements instead of using the disjunctives. However, a careful look into the semantics and draftsmanship involved show that the two meanings are consistent within the verbiage used. The problem is one of first impression since there is no identical statute or Ordinance with ours that I have been able to find.

[*Company Guilty*]

With all these matters considered I feel that the Defendant, F. W. Woolworth Company, should be found guilty of this charge for the reasons that I have given. First that the fact issue is very clear. Secondly, that the fact issue as determined comes within the precise meaning of Section 5c of the Ordinance.

Now, I think there is one other thing that is relevant in this case, something that Mr. Ryan brought out in his examination of Mr. Jacobowski, wherein Mr. Jacobowski was testifying relative to his conversation with Mr. Engle who was the store manager, and Mr. Jacobowski stated in answer to Mr. Ryan's questions concerning his conversation with the employer: "That certainly he (Engle) would instruct all of his employes and I believe his assistant manager and personnel girl that henceforth on they would take no more notes regarding the person's color, religion and so forth." I think this statement shows a good attitude on the part of the defendant in this matter. So what I would like to do is to continue this case until February 5th, 1957, and at that time I will pass sentence on this matter.

[*Sentencing Deferred*]

I do not care to pass sentence this morning because I want a report of the Executive Secretary of the FEPC outlining to me the attitude of the defendant in general concerning this Ordinance. As we realize this is primarily an educational process and not a penal matter, and since we may legislate on morals it is virtually impossible to legislate morals. Therefore, I feel that because of the educational aspect of this I would like to know what the defendant's attitude has been from this date forward, not necessarily its attitude up to this date, because it must be assumed that the defendants were contesting this matter and perhaps its attitude to this date was antagonistic and therefore the Court would like to see what its attitude will be henceforth.

The defendants have about two months' time and during that period I would like to have a report as to what their attitude presently is. I think the Executive Secretary can have a report to me by February 1, 1957. I want it in my hands at that time. Perhaps at that time we will have to make further study to determine what disposition should be made of this matter. We will impose sentence at that time.

Mr. Fenlon: The report of the Secretary will be made available to us?

The Court: Yes. The report will be made available and upon delivery to the Court a copy will be given to you, Mr. Fenlon. Is there any question?

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EMPLOYMENT
Fair Employment Laws—New York

Wendell A. JEANPIERRE v. Ward B. ARBURY, etc. as members of the State Commission Against Discrimination.

New York Supreme Court, Appellate Division, 1st Department, May 7, 1957, 162 N.Y.S.2d 506.

SUMMARY: A Negro in New York brought a complaint against Pan American World Airways System before the State Commission Against Discrimination alleging that he was denied employment solely on account of his race or color. The Commission conducted a preliminary investigation and determined that the denial of employment was not made on the basis of racial discrimination. The complainant petitioned a New York Supreme Court for review of the Commission's determination. That court held that there was not sufficient proof of discrimination on the basis of race in denying employment and affirmed the action of the Commission. *In re Jeanpierre*, 1 Race Rel. L. Rep. 685 (N.Y. Sup. Ct., Sp. Term, 1956). On appeal to the Appellate Division the petition was dismissed without reaching the merits of the case. The Appellate Division, two judges dissenting, held that there was no provision for court review of a preliminary decision, such as was involved in this case, of the Commission and that court review was thereby precluded.

Before PECK, P.J. and BREITEL, BOTEIN, RABIN and FRANK, JJ.

PER CURIAM.

Article 15 of the Executive Law, described as the Law Against Discrimination (§ 290), defines such discrimination in employment as constitutes an unlawful employment practice (§ 296), and establishes a procedure whereby any person claiming to be aggrieved by an unlawful employment practice may file a complaint (§ 297). One of the commissioners is then designated to investigate, and if after investigation he determines "that probable cause exists for crediting the allegations of the complaint" he will attempt reconciliation and persuasion; or, "if in his judgment circumstances so warrant" he may issue and serve notice of a formal hearing before three members of the Commission, at which testimony shall be taken under oath and transcribed. After the hearing the commission is required to state its findings of fact and to issue an order to cease and desist or an order dismissing the complaint. These orders, issued after full hearings before three commissioners sitting as the commission, are the only orders mentioned in Section 297.

[*Review Provided*]

Section 298 provides for judicial review of "such order" of the commission, upon the written transcript of the record upon the hearing. The court is given power to "make and enter upon the pleadings, testimony, and proceedings set forth in such transcript" an order enforcing, modifying or setting aside in whole or in part the order of the commission. The findings of the commission as to the facts are declared to be conclusive "if supported by sufficient evidence on the record considered as a whole." Proceedings for review are required to be instituted within 30 days after the service of the order of the Commission. No provision is made for judicial review of any intermediate decisions or determinations by any single commissioner.

Pursuant to the provisions of § 297, petitioner filed a complaint alleging that the rejection of his application for employment as a flight steward with Pan American World Airways System was motivated by racial discrimination. The commissioner who investigated found no probable cause for crediting the allegations of the complaint and dismissed the complaint without ordering any formal hearing. The determination of the investigating commissioner was sustained by the commission chairman. There was no order entered, there was no testimony taken under oath, no transcript, and no findings of fact. The commissioner merely declined to call a hearing, finding no warrant for proceeding further, and he notified petitioner of that fact by letter, informing him that the primary reason for his rejection was his "nebulous and inconsistent employment record."

Petitioner then commenced this proceeding under Article 78 of the Civil Practice Act, seeking an order reviewing and annulling the com-

missioner's determination which dismissed his complaint and denied him a hearing as provided in Section 297. Special Term, upon the merits, denied the application.

[*No Final Order*]

We are barred at the threshold from any examination into the merits of plaintiff's contention that he should have been afforded a hearing by the commission on the allegations of his complaint. Section 298 of the Executive Law does not provide for judicial review of all acts of the commission, but only of such orders as are made by the commission after a formal hearing at which testimony is taken under oath. The context of the section indicates clearly that the judicial review therein contemplated does not extend to any acts or determinations of the commission not resulting in such final orders after formal hearing. The commissioner's initial determination dismissing the complaint without a hearing was not such an order, since it is undisputed that the commission did not publish findings of fact or conclusions of law, nor did it hold any hearing at which testimony was taken under oath.

[*Legislative Intent*]

Since there is no specific provision in Section 298 for judicial review of the determination presented here, we next inquire into whether it was the legislative intention to afford judicial review of such preliminary or intermediate determinations under Article 78 of the Civil Practice Act, or whether the legislature intended to limit review only to orders specified in Section 298. The scope and standards of review set forth in § 298 for judicial review of the orders of the commission are those generally applicable to the review of all administrative determinations in Article 78 proceedings (Holland v. Edwards, 307 N.Y. 38, 44). See also Report of the New York State Temporary Commission Against Discrimination which drafted the section (Leg. Doc. (1945) No. 6, p. 33). It would be meaningless and unnecessary for the legislature to prescribe for certain specified categories of determination the standards and procedures for judicial review contained in Article 78 if it intended to allow the selfsame Article 78 review for commission determinations of all types (Guardian Life Insurance Co. v. Bohlinger, 308 N.Y. 174).

Here, as in the Guardian Life case, there appears a careful and consistent legislative design to grant judicial review in certain specific situations and to preclude such review in others. The only possible construction of the related statutory provisions is that the express grant of the right of judicial review for certain orders bars similar review where the right has not been explicitly granted. All that is open to the courts in such circumstances is "the duty to make certain that the administrative official has not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by the legislature" (Guardian Life Insurance Co. v. Bohlinger, supra, p. 183).

The legislature has decreed that the initial judgment in determining whether the information disclosed by his investigation warrants a formal hearing must be exercised by the investigating commissioner alone; and that his decision is not reviewable by the courts. In making his initial determination that no probable cause existed for crediting the allegations of the complaint and proceeding with the procedures outlined in Section 297, the commissioner followed the pattern prescribed by the legislature. He may have used bad judgment in exercising his powers, and his determination may seem unsupported by the facts; but he acted within the grant of authority given him by the legislature, and purported to apply its standards. Under the circumstances we do not reach the merits of this application, as did the court below, but we are constrained to modify the order appealed from by dismissing the petition upon these threshold considerations. No costs.

All concur except Rabin and Frank, JJ., who dissent in a dissenting opinion by Frank, J.

[*Dissent*]

Frank, J. (dissenting):

(Unless otherwise designated, the sections referred to are to be found in McKinney's Unconsolidated Laws, Vol. 18, Executive Law.)

The petitioner appeals from an order made at Special Term denying his motion in an Article 78 proceeding, which sought to (a) annul and rescind the dismissal of his complaint; (b) direct a finding that the petitioner was rejected by Pan American World Airways System by reason of his race alone; (c) remit the matter to the

State Commission for reconsideration and for it to take the procedures provided when probable cause is found to exist; (d) obtain such other and further relief as may be proper under the circumstances.

This appeal involves what we believe to be fundamental problems concerning the State Commission Against Discrimination. The extent of its power under the Executive Law (Article 15), the limitation upon its procedure, whether statutory or self-imposed, the finality of its order dismissing the proceeding, all these present questions which vitally affect the ability of the Commission to carry out the mandate of the State in the field in which it functions.

[*Facts*]

The facts in the case was not complicated. In December 1954, the petitioner, a Negro, applied for employment as a flight steward with Pan American World Airways. It is undisputed that neither Pan American nor any other airline operating out of New York City has ever employed a Negro in any flight capacity. Apparently the Urban League had made representations to Pan American concerning this situation and as the result thereof a number of Negroes, including the petitioner, were recommended as applicants for flight positions. When the petitioner had his first interview with Pan American, he was advised to seek other employment. It was suggested that, if hired, he might be embarrassed and made unhappy by acts of discrimination practiced by white flight personnel. many of whom were southerners; that the job was bad for one's ears; and that, in view of his linguistic aptitude, it might be more advantageous for him to obtain employment as a teacher. When the petitioner rejected these suggestions, he was interviewed by other Pan American agents.

Parenthetically, some of the reasons urged upon the applicant to discourage him in his quest for the job of his choice have been found by the commission in other cases to be of a stereotyped pattern, when discrimination is practiced.

On January 19, 1955, Pan American notified the petitioner in writing that his application for employment had been rejected, because his qualifications were found not to meet those required by the company. At that time, he was not told what specific requirements he lacked, although he did possess the essential facility in a foreign language.

[*Complaint Filed*]

In February 1955, the petitioner filed a verified complaint with the Commission, which was referred to Commissioner Pinto for investigation. The agency's field representative held conferences with persons employed by Pan American who informed him that the petitioner had been rejected not because of his race but because of his failure to submit a complete employment record. It should be emphasized that no such reason had been given to the petitioner. Months later and after a conference between the Commissioner and some officials of the airline, the petitioner filed an amended application containing his full work history. Thereafter he was reinterviewed in June 1955, and upon the basis of the complete work record Pan American again rejected him. The record is clear, however, that absent the questioned work record, the petitioner was otherwise fully qualified. The time lapse of more than six months between the first application and the final disapproval is significant. A person who is uncertain of being hired because of the delaying tactics of a reluctant prospective employer may be compelled, by economic necessity, to abandon his efforts and seek employment elsewhere. It is equally noteworthy that during this period the company offered the petitioner a job in a non-flight capacity, at a salary in excess of the scheduled salaries for flight employees. Apparently his previous work record was not considered as a disqualifying factor in this instance and no reason was given for the distinction made.

Following the procedure outline in the Executive Law and the regulations for the processing of verified complaints to the point of determining probable cause, Commissioner Pinto, by letter dated October 13, 1955, notified the petitioner that the complaint was dismissed. Pursuant to the rules, the petitioner appealed to the Chairman of the Commission for reconsideration. The Chairman affirmed the ruling of Commissioner Pinto.

[*Was Determination Final?*]

As we view it, the first problem posed is whether the dismissal of the petition as affirmed by the Chairman was a final determination by the Commission and, if so, whether resort to the Supreme Court, either by an Article 78 proceeding (Civil Practice Act) or pursuant to

Section 298 (Executive Law), is available to the aggrieved petitioner.

The majority holds that by reason of lack of jurisdiction to review, "(w)e are barred at the threshold from any examination into the merits * * *" and that "we are constrained to modify the order appealed from by dismissing the petition * * *."

[*Remedies Exhausted*]

We must dissent. There does not appear to be any dispute that the determination made by the investigating commissioner and affirmed by the Chairman was a final order, even though in letter form. The petitioner exhausted all the remedies available to him under the internal procedures adopted by the Commission (Rule 2K; Rule 4, Rules Governing Practice and Procedure). Insofar as the agency was concerned, it terminated the matter. (See People ex rel Uvalde A.P. Co. v. Seaman, 217 N.Y. 70, 76; Suppus v. Bradley, 278 App. Div. 337, 339; Rochester Tel. Corp. v. U.S.; 307 U.S. 125, 143; Fed. Power Comm'n. v. Pacific Co., 307 U.S. 156.)

We cannot accept the thesis that only an order issued by the Commission after a formal hearing is subject to Court review, and that the only judicial review available is under Section 298, as distinguished from Article 78 proceeding. Nor does the Commission take so narrow a view. It seeks not a dismissal of the proceeding, but only an affirmance of the order at Special Term. The Commission argues (Brief, p. 15) that since its determination was without a hearing, the plaintiff must establish his "clear legal right" to the relief sought, and then asserts that its determination was not unreasonable, arbitrary or capricious. Thus it seeks an adjudication on the merits. At Special Term, the learned Justice was satisfied that judicial review was an available remedy, and considered the matter upon the merits.

The majority predicates its determination that no court review of the order is available to the petitioner upon the authority of Matter of Guardian Life Insurance Co. v. Bohlinger, 308 N.Y. 174.

[*Case Distinguished*]

We do not believe that the cited case so decides. There the Court of Appeals, in passing upon the right to judicial review of Section 81, subd. 7, pars. (a) and (b) of the Insurance Law, held that the legislature had (p. 180) "carefully and deliberately" limited judicial review to specific decisions made by the Superintendent. In the instant matter no such legislative design is manifest.

Judge Fuld, writing for the Court, stated (p. 180): "Although the courts will be exceedingly slow to rule that the discretion of an administrative officer or Board 'may be exercised unhampered by judicial review' (Matter of Schwab v. McElligott, supra, 282 N.Y. 182, 186), it is settled that the legislature may, if it sees fit, provide that certain action 'is not a matter open to (such) review.' * * * (p. 183): That is not to say, however, that there is to be no judicial scrutiny whatsoever. Even where judicial review is proscribed by statute, the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given him by the statute or in disregard of the standard prescribed by the legislature. (Cf. Matter of Barry v. O'Connell, 303 N.Y. 46, 52; People ex rel Metropolitan Life Ins. Co. v. Hotchkiss, 136 App. Div. 150). So here, for instance, the courts will decide whether or not the superintendent, in reaching his conclusion, employed the standard fixed by the statute* * *."

This Court in the same case likewise rejected the idea that the courts could not and should not make a threshold examination as to whether the agency exercised its determination within the framework of the standards set.

[*Court Review Available*]

We do not believe that the Court of Appeals in the Guardian Life case did, or intended to, overrule Schwab v. McElligott (282 N.Y. 182, 186) which is cited in its opinion and from which it quotes. In Schwab v. McElligott, it stated that "in the absence of clear expression by the legislature to the contrary, the courts may review the exercise of a discretionary power* * *."

We have heretofore held that "absent express legislative prohibition, there is inherent power in the courts to review the exercise of discretion or the abuse thereof by an administrative agency performing a quasi-judicial function" (Matter of McCall Corp. v. Gerosa, 2 A D 2d, 358, 361). The Court of Appeals has declared that it is "the duty of the courts to set at naught arbitrary and unfounded administrative holdings." (Matter of Rumsey Mfg. Corp. (Corsi), 296 N.Y. 113, 118.)

[*Other Acts Distinguished*]

Unlike its treatment of the Insurance Law and the Alcoholic Beverage Control Law, the legislature in enacting the Executive Law did not "carefully and deliberately" differentiate between reviewable and non-reviewable acts and decisions of the Commission. Here the legislature did not pick and choose individual sections to provide review of some and not of others. On the contrary, it provided an omnibus judicial review section just as it did in the New York State Labor Relations Act and the Emergency Housing Rent Control Law. The legislative history of the Executive Law provisions here considered indicates that the procedure recommended was simple and self-explanatory and "(f)urther specification can readily be supplied by the rule-making power of the agency and through the detailed provisions provided in the Civil Practice Act and in the Rules for Civil Practice applicable to proceedings of this character," and that "(T)he provisions for judicial review are merely a condensation from the provisions on this subject in the State Labor Relations Act (Labor Law, §707) and in other statutes for procedure by way of orders to cease and desist, with enforcement in the courts" (Leg. Doc. #6 (1945) Report of Temporary Commission Against Discrimination, pp. 25, 32). It is a fair inference that the Temporary Commission was primarily concerned with the procedure to be followed for the enforcement of cease and desist orders. In interpreting Sec. 707, Labor Law, the courts have held that the dismissal of a complaint is reviewable, and upon such review, considered the reasonableness of the order issued by the Board (Newspaper and Mail Deliverers' Union v. Kelley, 75 N.Y.S. 2d 539).

[*Commission's Rules*]

Acting under the general powers granted it (Section 295) the Commission has the duty "(T)o adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article, and the policies and practice of the Commission in connection therewith." Pursuant thereto, it enacted "Rules covering practice and procedure" which were filed in the office of the Department of State on May 14, 1953. After providing for internal appeal (Rules 2K, 4), the Commission enacted Rule 13(a) which states that: "Any complainant, respondent or other person aggrieved by an order of the commission may obtain judicial review thereof, * * * ." The rule is not limited to orders after hearing. While not binding upon the courts, great weight should be accorded to the agency's interpretation of statutes (Leighton v. Bearman, 278 App. Div. 72, aff'd 302 N.Y. 865).

In addition to the difference in legislative history, there is a fundamental distinction between the functions of the Superintendent of Insurance and the respondent. Benjamin (Administrative Adjudication pp. 49-50) points out the difference between the former and the Labor Relations Board:

> "* * * The Insurance Department (is engaged) in the continuing regulation of a field of industrial or business activity* * * . The functions of the present Labor Relations Board are not administrative in the same sense. The machinery set up by the Labor Relations Act for the enforcement of the rights conferred * * * is essentially the machinery of litigation and adjudication."

If the name of the subject agency were substituted for that of the Labor Board, the analysis becomes particularly cogent here.

[*Constitutional Provision*]

Assuming that the determination in Bohlinger v. Guardian Life is to be applied here, what are the criteria created by the Law, by which the Commission is to be guided and which the courts must consider in determining the propriety of the agency's action? The Constitution of the State of New York sets the standard. In 1938, a new section was added to its Bill of Rights (Art. 1, Sec. 11), which provides, "No person shall be denied the equal protection of the laws of this state or of any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution or by the state or any agency or subdivision of the state."

The need for engraving such a declaration upon the keystone of our law undoubtedly stems from the recognition that "Each case of denial of rights to an individual * * * may seem to be relatively unimportant, but we know now, more surely than ever before, that callousness to the rights of individuals and minorities leads to the barbarism and the destruction of the essen-

tial values of civilized life." (People v. Barber, 289 N.Y. 378, 386).

[*Prior Laws Ineffectual*]

Indeed, long before Article 1, Section 11 was adopted, laws prohibiting discrimination against Negroes were upheld (People v. King, 1886, 42 Hun 186, aff'd 110 N.Y. 418), but were found to be ineffectual in eradicating the evil.

When the Commission was created (Chap. 118, L. 1945) the legislature declared that "(T)he opportunity to obtain employment without discrimination because of race, creed, color or national origin is hereby recognized as and declared to be a civil right" (Sec. 291). Because the problem was of such vital "state concern," the agency was created by the exercise of the State's sovereign police power (Sec. 290).

The difficulties attendant upon the establishment of the necessary proof to determine whether there is a violation of the constitutional and statutory standard have been heretofore recognized. This court in Matter of Holland v. Edwards (282 App. Div. 353, 359) said: "All this, in the end, turns upon how facts are evaluated and how they are seen in correlation with each other. Discrimination in selection for employment based on considerations of race, creed or color is quite apt to be a matter of refined and elusive subtlety. Innocent components can add up to a sinister totality."

The Court of Appeals, in affirming (307 N.Y. 38, 45) observed that, "(o)ne intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct * * * play no small part.'"

It is within this frame of reference, that we believe that the duty devolves upon the court to examine the record in order to decide whether the action taken by the Commission should be sustained.

[*Merits of Case*]

We now pass to a consideration of the merits in this controversy. In order to establish "probable cause to credit the allegations of a complaint," there is no requirement to prove the facts to a moral certainty, or beyond a reasonable doubt, or even by a preponderance of the evidence. In Carl v. Ayers, 53 N.Y. 14, 17, it was said, "Probable cause * * * is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged." To like effect see Ballentine (2d. Edition, p. 1021) on definition of "probable cause," and Black's (4th Edition, p. 1431) definition of "reasonable and probable cause."

In his letter of October 13, 1955, dismissing the petition, the Commissioner stated in part as follows, "* * * I have concluded that the evidence is insufficient to warrant a finding that you were rejected because of your race and color. * * * As the respondent does not employ any Negro stewards or stewardesses, there is some suspicion that they are not acceptable in such positions. * * * The Commission has repeatedly held that the mere absence of certain racial or religious groups on the employment rolls of an employer is not in and of itself sufficient evidence on which to predicate a finding that representatives of such groups are barred from employment. Under the circumstances, I am constrained to hold that probable cause does not exist to credit the allegations of your complaint. * * *"

[*Other Factors*]

However correct the Commissioner's statement may be that the failure of employ certain racial or religious groups is not in and of itself sufficient to predicate a finding of probable cause, it is not correct to assume that the investigation disclosed nothing more. The record discloses that, in addition to the failure to employ Negroes in flight capacities, a definite attempt was made to discourage the petitioner's efforts because of his color. He was given no reason for his first rejection. Only after the intervention of the Commission, did Pan American for the first time state that the complainant had been rejected because his work record was incomplete. When the information was supplied, the second rejection was based upon the ground that petitioner's frequent changes of employment made him undesirable. At the same time, two white men were hired although one had held eleven jobs in 7 years and the other had a similar record of frequent job changes. The only difference was that the petitioner was a Negro.

Of course, Pan American through its agents

denied discriminating against this petitioner and denied a general policy of excluding Negroes in flight capacities, although in the Atlantic Division alone it employes more than 300 stewards and stewardesses. To explain the absence of Negroes in this group, it was stated that only three applications (including the petitioner's) had been filed by Negroes. To buttress the assertion, the respondent produced the documents. We cannot determine from the record whether application forms are filled out before or after the preliminary interview. If the latter be the case, then there is no way of determining how many Negroes may have been rejected before the forms were supplied.

The assertion that only three such persons had applied would then be wholly unsupported by documentary proof.

[*Commission's Standard*]

The Commission, all too familiar with the pattern adopted by employers to avoid the charge of discrimination, has by its own procedure created a standard which complies with the purpose of Article 15 of the Executive Law. It has found probable cause upon facts less persuative than exist here. In the subjoined footnote, we cite some cases taken from the Annual Reports filed and published by the Commission to demonstrate the standard adopted by the agency.

We believe from the record that there is more than a mere suspicion that a policy of systematic exclusion of Negroes from flight personnel existed and that probable cause to credit the complaint was actually found. It will be noted from Section 297 that in such event the investigating Commissioner "shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation and persuasion." Here, Commissioner Pinto did just that.

On May 25, 1955 (Attachment #19, Exhibits), the Commissioner held a conference attended by four officials of Pan American World Airways System. He apparently accepted the bare statement that only two other Negroes had applied for flight service and the three cases were discussed. He made no further inquiry as to the rejection of others or what means were available to ascertain how many Negroes had applied. A colloquy then ensued concerning general company policy. It is patent that Pan American had considered the employment of Negroes in flight capacities but had rejected the idea because "* * * much of the flight personnel are southerners, and the nature of the job requires these people to be brought together intimately, not only on the planes but at foreign stations throughout the world where they share the same hotels together. * * * this could be a prime problem in employee relations. * * * (and) negro flight personnel would have a very bad time on flights going to South Africa."

[*Conciliation Attempted*]

The investigating Commissioner made efforts to conciliate and persuade, and arranged for subsequent conferences with other company officials. Since these activities, under the statute, can only follow a finding of probable cause, the conclusion is inescapable that probable cause did exist and that the Commission erred in dismissing the complaint.

There is another cogent reason why the courts should set aside the final order in this proceeding and remit the matter, a reason which goes far beyond the petitioner's individual problem.

[*Commission's Functions*]

We are of the view that the orders issued by the Commission under the power granted it by the Executive Law, as confirmed by the courts (see Holland v. Edwards, 307 N.Y. 38; In Re Castle Hill Beach Club v. Arbury, 2 N.Y.2d .....) clearly establish that the Commission has two major functions. The first is to entertain, consider, investigate and determine a complaint filed by an individual and make such order with respect to that individual as is reasonable and proper under the circumstances; the second, and we deem it the more important, is to determine whether an over-all pattern of systematic exclusion or discrimination exists, either in the total operation of an employer or throughout an industry, and if so, to make appropriate orders.

It is a matter of public record that for several years the Commission has sought legislation to give it the power to file its own complaints. It could then initiate a proceeding which could result in the issuance of a cease and desist order. Although bills have been introduced for that purpose, the legislation has failed of passage.

While it has the authority to make studies and investigate, the Commission has no power,

in the absence of a verified complaint and a finding of probable cause, to hold a hearing or thereafter to issue a cease and desist order. (See article by the general counsel to the Commission, N.Y.L.J., April 6, 1951, P. 1246.) Without a complaint, no controversy exists (Ivory v. Edwards, 276 App. Div. 359).

[*Investigation Continued*]

In a letter dated October 17, 1955, addressed to Pan American, Commissioner Pinto advised the respondent of the dismissal of the complaint against it, and stated that on the aspect of "overall employment practices and policy" the investigation would continue. That assertion was meaningless insofar as the power of the Commission was concerned to hold a hearing and, if satisfied that a policy of discrimination existed, to issue a cease and desist order. Having dismissed the complaint it had stripped itself of the power to make or enforce any order.

Even assuming arguendo, that it was justified in finding that no probable cause existed with respect to the petitioner's charge as it concerned him individually, the complaint should not have been dismissed, for it contained a charge of a general discriminatory policy.

The record discloses that Pan American, after consideration of the problem, decided that it was inadvisable for it to employ Negroes in its flight service. Whether it reached that conclusion after intensive soul-searching or whether the decision was reluctantly reached as the most convenient labor policy available, it was nonetheless a violation of the Executive Law (Sec. 296, 1(a)). The law and the policy of the State require the Commission to proceed upon a complaint where probable cause exists. It may not avoid the full discharge of the duty imposed upon it because compliance may prove embarrassing, distasteful, or even troublesome to an employer. By conferences and orders, the Commission solved just such a situation involving employers and labor unions in the brewing industry (Workman, et al. v. Bottlers & Drivers Union, etc. Liebmann Breweries, etc., 1955 Annual Report, pp. 94-97).

[*Statement of Court Below*]

In this case, Special Term indicated that "there are several suspicious circumstances * * * that perhaps the petitioner was rejected because of his color, which at least would require further inquiry * * *." So properly concerned was the learned Justice, that he conferred with the Chairman of the Commission who assured him that the investigation would be continued "with a view to determining whether there is a concerted policy on the part of the airlines to exclude Negroes" from flight positions. The statement, even if made with the best intentions, was misleading, for assuming such a concerted policy were found, no hearing and no order could follow.

The Commission has the power, in a proper case, to dismiss so much of a complaint as charges discrimination against the individual complainant, yet to sustain the allegation which charges discrimination as a general employment policy. The Commission's general counsel has stated:

> "A complaint may be dismissed with respect to an individual grievance, but may be sustained with respect to the charges of and overall discriminatory hiring practice." (N.Y.L.J., p. 1326, April 12, 1951.)

In the article he described a case in which the agency took such action when a Negro applicant for a job as a bus driver filed a complaint charging discrimination personally and as a general policy. Although the applicant was disqualified because he was over the age for employment, the complaint charging overall policy was sustained, and the procedure provided after the finding of probable cause was followed.

[*Enforcement Power*]

That the filing of a verified complaint is vital to enable the Commission to obtain jurisdiction, is best evidenced by Section 297 which permits amending the petition, and by the rules and regulations (Sec. 2, subd. i, j) of the Commission which prohibits the withdrawal of a complaint except upon the written consent of one or more Commissioners. The Annual Reports contain numerous cases where the Commission refused to permit withdrawals. The reason is obvious. The withdrawal of a complaint strips the Commission of its power to enforce its mandate.

For all of the reasons herein stated we must hold that the petitioner established a clear legal right for judicial review. We are satisfied that the action taken by the Commission was not in accordance with the standards set by law, and

we hold that the dismissal of the complaint was an improvident exercise of discretion and was arbitrary, capricious and unreasonable.

[*Castle Hill Beach Club Case*]

We believe that upon the facts, this case falls within the ambit of Chief Judge Conway's language in the Castle Hill Beach Club case (2 N.Y.2d.....) where he said: "The various aspects of a plan or scheme when considered singly, may very well appear innocent. The true nature * * * is revealed only when the various aspects are viewed as a totality. Such is this case."

The complaint should be reinstated and a finding of probable cause to credit the allegations made. Such a determination does not require the issuance of a cease and desist order. It does require that the conciliation and conference method be followed as the next step in the procedure. Failing that, the investigating Commissioner may then direct that a hearing be held. We are not here concerned with the determination that may follow such a hearing, although from this record it would appear that a hearing, at least upon the general employment policy of Pan American, is called for, in the event that conference and conciliation prove unavailing.

The order of Special Term should be reversed, the complaint reinstated and the matter remitted to the Commission for further action consonant with the views herein expressed.

FOOTNOTE

There are many other cases cited in the Annual Reports which demonstrate the standard set by the Commission for a finding of probable cause. They are omitted here, first, for brevity, and second, because there is no statement *in haec verba* of a finding of probable cause although the procedure adopted could only follow such a determination.

(1) A factory employed 223 persons, not one of whom was a Negro. A Negro complainant charged in her complaint that she was refused employment because of her color. The complaint charged that although she was the first to respond to the employer's help wanted advertisement, she was turned away with the excuse that a number of applicants had already been hired and no more vacancies existed. The employer's manager conceded that the complainant was well qualified, but that he had "overlooked" her application. A finding of probable cause was made. It should be noted that the investigating commissioner determined that the fact that no other Negroes were employed, standing alone, is not conclusive, but when considered with the other circumstances the finding of probable cause was justified. (Williams v. Kerk Guild Products Corp., pp. 49, 50, Annual Report.)

(2) A Negro woman applied to the supervisor of the coffee shop in a hotel for a position as a waitress, pursuant to a newspaper advertisement and was informed that no jobs were available at the time and that the purpose of the advertisement was to obtain a list of qualified persons for the future. The investigation disclosed that the hotel's coffee shop had been customarly staffed with white waitresses although Negroes were employed in other capacities. In determining that probable cause existed to credit the allegations of the complaint the investigating commissioner found, "It seems clear that there has been in existence for a long time a pattern of employment for the position of waitress in the coffee shop which discriminates against negroes. In the light of the facts in this case, protestations of freedom from bias failed to carry conviction and remind one of the adage that 'actions speak louder than words.' ". (Hardy v. Schenechtady Hotel Company, Inc., pp. 52, 53, 1954 Annual Report).

(3) A verified complaint filed by a Negro woman charged discrimination because of color. She had been denied employment at the Westchester branch office of an insurance company where she had applied for a secretarial position. It appeared that no Negro had ever been hired in any capacity, although a substantial number of Negroes had presented themselves and the branch office staff was comprised of approximately 300 persons. A finding was made by the investigating commissioner that probable cause existed to credit the allegations of the complaint. (Sellers v. Allstate Insurance Co. P. 50, 1955 Annual Report.)

(4) A Negro railroad worker applied to the Long Island Railroad Company for em-

ployment, on three separate occasions. Each time he was told that no one was being hired. He filed a complaint charging discrimination because of color. After investigation, probable cause to credit the allegagations of the complaint was found. In making that finding the investigation commissioner stated in part, "Standing by themselves the facts herein leave doubt as to whether there was probable cause to credit the allegations of this complaint. However, in no case can the facts be examined in a vacuum. The review of the employment pattern of the respondent * * * indicates that negroes have been systematically excluded from employment in responsible positions. At the time of the investigation of this complaint there were no negro trainman nor others of the negro race in responsible positions with respondent, and the total picture is one which could be brought about only by traditional racial discrimination long persisting." (Willis v. The Long Island Railroad Company, Pp. 88, 89, 1955 Annual Report.)

(5) Probable cause was found where a textile manufacturer with a labor force of 700 persons employed only one Negro. The employer asserted that the failure to employ Negroes was based upon the objection of other employees. (1948 Annual Report, Case #3, P. 30.)

(6) Probable cause to credit the allegations of a complaint was found in a case where the complainant charged that she had been refused employment as a telephone operator because of her color. The complainant never received the mental aptitude test or the physical examination usually given to applicants by respondent. The contention of the respondent that the complainant was not hired because the respondent gave preference to applicants who did not have small children was rejected (Woodley v. Upstate Telephone Co. Pp. 36, 37, 1949 Annual Report.)

(7) Probable cause was found to exist where an employer was charged with having refused to hire complainant as a machine cutter because of his color. The respondent took the position that the foreman had rejected the complainant because he was not a union member rather than because of his color. Upon investigation it was found that the shop was one where the employer is permitted to hire anyone provided the non-union worker joins the union within 30 days after hiring. (Berry v. Rockland Sportswear Co., 1951 Report.)

(8) Probable cause was found where a Negro complainant alleged that when he applied for an advertised position for which he was qualified, he was advised that he could not be considered because the position in question entailed supervision over white girls. (Fields v. Will Mark Service System, Inc., P. 59, 1950 Annual Report.)

(9) Probable cause was found to exist when an employer informed an applicant for a position as general office worker that he would not want to expose her to expressions of anti-semitism from some of the employer's wealthy clients. In disposing of the case, it was held, "An employer must not let his consideration of an applicant be altered" because the applicant might be subject to hearing discriminatory remarks. (Salston v. Previews, Inc., Pp. 32, 33, 1952 Annual Report.)

(10) A finding of probable cause was made where a Negro claimed he was refused employment because of his color. The respondent explained the failure to employ on the ground that its store was located in the Stuyvesant Town area of New York City where tension had developed involving the presence of Negro tenants. (Sawyer v. Whelan Drug Co. Inc., P. 39, 1953 Annual Report.)

(11) Probable cause was found in a case in which the complainant whose full name was Joan Cogan Finkelstein was hired under the name of Joan Cogan. When she appeared for work and presented her birth certificate which contained her full name, she was told that her hiring was a mistake because the position had been filled prior thereto. (Finkelstein v. G. R. Kinney & Co., Inc. Pp. 51, 52, 1952 Annual Report.)

(12) Probable cause was found where a colored applicant for a clerk typist position was prevented from seeing the interviewer for two and a half hours by the

receptionist, who falsely stated that the interviewer was out of the office (actually the interviewer was in the office). Barnes v. Newark Electric Co., P. 34, 1949 Annual Report.)

Rabin, J., concurs.

EMPLOYMENT
Labor Agreements—California

William H. JONES v. AMERICAN PRESIDENT LINES, Ltd., et al.

District Court of Appeal, First District, Div. 2, California, March 20, 1957, 308 P.2d 393.

SUMMARY: Jones, a Negro, brought an action for damages in a California state court against a shipping company and others. The action was based on an alleged conspiracy of the defendants to deny the plaintiff, because of his race, employment as a cook on vessels of the shipping company. The defendants demurred to the complaint on grounds that the California court did not have jurisdiction. The demurrer was sustained and judgment entered for the defendants. On appeal to the District Court of Appeal, the judgment was reversed. That court held that whatever rights the plaintiff had to secure employment without discrimination on the basis of race were secured to him through a clause in a prior labor agreement entered into by the shipping company and a labor union. Parts of the agreement had been saved by the operation of a consent decree entered by a federal district court on petition of the National Labor Relations Board. The court further held that the basis of the action brought by the plaintiff was for a conspiracy to deprive him of the benefits of the contract and not on the basis of an unfair labor practice.

ANTHONY BRAZIL, Justice pro tem.

The appeal is from a judgment entered after a demurrer to the first amended complaint was sustained without leave to amend. The demurer, filed by the three named defendants jointly, was based upon only one ground, namely: lack of jurisdiction in the State Court.

The complaint alleges in two counts an action for damages resulting from a civil consipracy among the three defendants to deny plaintiff his rights to employment aboard two of the company's ships. Whatever determination is made as to one count applies to the other for they merely represent different instances in which appellant was not accepted for work after reference therefor by the registration office.

The complaint alleges that the Pacific Maritime Association, acting for defendant shipping company and other like companies in December 1948, contracted with a cooks' and stewards' union concerning substantive rights of shipping company employees. Detailed provisions were contained for settlement of all disputes connected with the agreement by arbitration under the designation "Grievance Machinery."

[*Prior Consent Decree*]

In an action filed by the National Labor Relations Board in the United States Court of Appeals, Ninth Circuit, a Consent Decree was entered in May 1952 on behalf of American President Lines and other shipping companies, by which decree it was ordered that all parties desist from performing or giving effect to the 1948 contract. The decree, however, ordered into immediate effect a certain "Outline of Terms and Conditions of Employment of Cooks and Stewards," portions of which are pleaded in the complaint. The outline provided that the substantive parts of the contract regarding wages, conditions of employment, shall remain in effect and that employees shall continue to have the rights they had under the contract. One of the provisions of the Outline which, in fact, forms the basis of plaintiff's allegation of civil conspiracy and consequent damage is as follows:

"Section 5. Non-Discrimination.

"No employee or applicant for employment shall be discriminated against by reason of sex, race, creed, color, national origin,

political views or affiliations, or legitimate union activity."

[*Method of Employment*]

The Outline then provides for a central registration office for registering applicants for work as maritime cooks and stewards, for a master registration list by which applicants would be hired in sequence of time of registration, and then provides for the appointment of a referee having power to finally adjudicate all disputes and grievances arising out of such employment. Contained in the Outline is the following paragraph:

"3. Grievances. Grievances may be presented by any employee. He may at the outset of each voyage or thereafter designate a delegate from among the ship's stewards department to represent him for the handling of any grievances aboard ship. He may consult in port with a representative of any union regarding the case. He may have such representative present, or assist in the presentation of, his case to the company representative. If the adjustment of the grievance at this step is unsatisfactory, the individual may appeal to a Port Committee step by designating the Port Committee of a stewards department union as his representative. Appeal to the Court appointed referee is the final, or arbitration, step, where an individual may be represented by a representative of the union he has designated."

The Outline gives the referee power to settle disputes on an applicant's qualifications for a position without a formal hearing yet reserving to the unions and Pacific Maritime Association a reasonable opportunity to present relevant evidence. The complaint then alleges (legal conclusions)

"that said Decree and said Outline contained no provisions for the arbitration or adjudication of controversies concerning claims for damages on account of conspiracies and other wrongful acts causing damage by the denial of the substantive rights afforded a seaman by Section 5 of said contract."

Then follow allegations that plaintiff having registration priority and proper qualifications therefor was on December 8, 1954, refused the job of relief cook on the S.S. President Monroe; and in like manner in the second cause of action, on February 1, 1955, he was refused the job of sauce cook on the S.S. President Cleveland. It is alleged that the real reason for the refusal to hire plaintiff was because he was a member of the Negro race. It is next alleged that defendant Vaughan was port captain with general supervision at San Francisco of hiring employees for defendant shipping company and that defendant Souza was its shipping master who had personally refused to hire plaintiff for the two ships.

The plaintiff alleges that the three defendants conspired to defraud plaintiff of his rights, resulting in deprivation of those rights accorded him under Section 5 of the contract to his damage in a stated amount for each cause of action, together with request for punitive damages.

[*Effect of Demurrer*]

We start with some well recognized principles of law: A demurrer admits all the allegations of the complaint which are well pleaded, and it must be assumed on appeal from a judgment predicated upon the sustaining of a demurrer that plaintiff could prove all the facts as alleged. Wirin v. Horrall, 85 Cal.App.2d 497, 193 P.2d 470. Truth of conclusions of law are not deemed admitted by a demurrer, Connecticut Gen. L. Ins. Co. v. Johnson, 8 Cal.2d 624, 67 P.2d 675, and the same is true of allegations which are contrary to facts of which a court may have judicial knowledge.

To state a cause of action for conspiracy facts must be alleged showing the formation and operation of a conspiracy and damage resulting from acts done in furtherance of the plan. The cause of action is for the damage suffered, not the mere conspiracy; and facts must be alleged which show that a civil wrong was done resulting in damages. Respondent concedes there are sufficient allegations to two necessary elements —joint action and injury to plaintiff—but claims no rights of plaintiff have been interfered with for he got none from the Consent Decree, and if he can't find his rights in that court order then they simply do not exist. Joint action causing injury is not sufficient for a civil action; something must be done which without the conspiracy would give a right of action. Perry v. Meikle, 102 Cal.App.2d 602, 228 P.2d 17.

[*No Constitutional Protection*]

The right to private employment without discrimination on the basis of race is not one protected by the Constitution, by common law or any statute of the state that we are aware of; and so plaintiff has not alleged any violation of state or federal laws. If plaintiff has any rights, the interference with which has caused him damage, they must exist, if at all, under the provisions of the Circuit Court of Appeals Consent Decree of May 1952 or under the terms of the contract between union and employer of December 1948, insofar as those contract rights are preserved by said decree for the benefit of plaintiff.

Respondents contend that the right to enforce the provisions of the decree, it having completely superseded the contract, lies solely with the National Labor Relations Board; that the decree sets up an exclusive method for settlement of disputes by employees about working conditions, which would, of course, include racial discrimination and when the Board has made its order, the Board alone is authorized to take proceedings to enforce it. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738. However, plaintiff does not seek to enforce the Board's order, as contained in the Consent Decree, but to recover damages for what others have done to him in unlawfully depriving him of certain claimed rights.

It has been held in International Sound Technicians v. Superior Court, 141 Cal.App.2d 23, 296 P.2d 395 (hearing in Supreme Court denied) that a state court has jurisdiction of an action for damages for wrongful invasion of an employee's right to work, even though said invasion also constitutes an unfair labor practice. The opposite would be true where injunctive relief is sought.

[*Definition of "Employee"*]

There is little merit in appellant's contention that the Outline, which is a part of the Consent Decree, does not apply to an applicant for work because it refers only to "any employee" for applicants for employment are included in a definition of "employee" within the meaning of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq. John Hancock Mut. Life Ins. Co. v. National Labor Rel. Bd., 89 U.S.App.D.C. 261, 191 F.2d 483. In like manner, appellant's view that jurisdiction is somehow given to the State Court by respondents' failure to apply to the Federal Court to restrain plaintiff from prosecuting the present action cannot be sustained. If exclusive jurisdiction lies in the Federal Court, non-action on defendants' part will not give it to the State Court. Vandalia Ry. Co. v. Keys, 46 Ind.App. 353, 91 N.E. 173, does not support his position, for that case involved concurrent, not exclusive jurisdiction.

The plaintiff's complaint is not aimed at settling a grievance or dispute with the shipping company over rate of pay, priority, discrimination or conditions of employment with a view to getting a job or preventing the company from pursuing any course of action. His complaint sounds in tort for damages resulting from wrongful concerted action which deprived him of rights given him by the 1948 contract and expressly preserved by the Consent Decree of 1952. How or in what manner he may prove damages is not a matter of concern here. If he has these private rights, if they have been wrongfully interfered with, if damage was thereby a proximate result, there is no method of redress set up in the Decree and Outline which affords him any remedy.

[*Effect of Consent Decree*]

The respondents maintain that the Consent Decree created no privately enforceable rights, having in Paragraph 1 thereof clearly abrogated all contracts covering the stewards department, thereby preserving none of the provisions of the contract of 1948. Paragraph 1 of that decree does provide among other things that the parties to the contract "Cease and desist from: * * * (2) Performing or giving effect to their contract of December 2, 1948 * * *" Paragraph 6 of the same decree says: "The Outline of Terms and Conditions of Employment of Cooks and Stewards attached hereto as Appendix H shall be immediately adopted, put into effect * * *" etc. Paragraph 1 of Appendix H is as follows:

> "1. In accord with the Board's order, the substantive provisions of the pre-existing contract with respect to wages, rates of pay, hours of work, and other conditions of employment with preference as stated herein *shall remain in effect and employees shall continue to have any rights that they may have acquired under the pre-existing con-*

tract and its supplements and amendments." (Emphasis added.)

The preservation of whatever rights employees (including applicants for employment) may have had under the 1948 contract could not have been expressed in clearer language. It is apparent that the abrogation clause in the decree is subject to and is modified by the foregoing preservation clause and so they are not in conflict with each other but stand together as effective parts of the court's decree.

While not agreeing with respondents' assertion that this court can take judicial notice of the decree of the Federal Court of Appeals, appellant, as he puts it in his closing brief, "does not object to the inclusion of the decree"; all of which obviates the necessity of considering this phase of the case. See Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 207 P.2d 647, re judicial notice. The Exhibit of Pacific Maritime Association, found in the appendix to respondents' brief is no part of the record on appeal, nor does the court take judicial notice of its contents.

The judgment of dismissal having been based upon a demurrer which stated only one ground—"That the court has no jurisdiction"—we are not here concerned with the presence or absence of any of the remaining grounds for demurrer to be found in section 430 of the Code of Civil Procedure. Specifically, we do not here decide whether the provisions of the Arbitration Statutes, Code Civ.Proc. § 1280 et seq., do or do not apply.

Judgment reversed.

DOOLING and KAUFMAN, JJ., concur.

EMPLOYMENT
Labor Unions—Federal Statutes

John D. MARSHALL et al. v. CENTRAL OF GEORGIA RAILWAY COMPANY et al.

United States District Court, Southern District, Georgia, October 24, 1956, 147 F.Supp. 855.

SUMMARY: The plaintiffs, Negro employees of the railway company and the Southern Association of Colored Railroad Trainmen, brought an action for an injunction in federal district court. The action was brought against the railway company, the Brotherhood of Railway Trainmen, and others to prevent the putting into effect of a collective bargaining agreement between the railroad and the Brotherhood. The agreement provided for a reduction of hours of work and an increase in the rate of pay for certain classes of employees. The plaintiffs stated that the agreement was invalid because the Brotherhood, as the authorized bargaining agent, did not fairly represent the Negro employees. After hearing the court dismissed the action, stating that the agreement did not discriminate against any class of employees and that representation by the Brotherhood was fair and impartial.

SCARLETT, District Judge.

The plaintiffs as Negro trainmen employed in the Savannah Division of the Central of Georgia Railway Company and the Southern Association of Colored Railroad Trainmen bring an action on behalf of such Negro trainmen and others similarly situated against the defendants to prevent their putting into effect the five day work week under a collective bargaining agreement entered into between railroads represented by the Eastern and Western and Southeastern Carriers Conference Committees and the trainmen represented by the Brotherhood of Railroad Trainmen, which included the defendant Central of Georgia Railway Company and the Brotherhood of Railroad Trainmen, which Agreement was to become effective December 1, 1955.

[*Relief Sought*]

Plaintiffs further prayed for a declaratory judgment to declare that the Brotherhood of Railroad Trainmen, before entering into any collective agreement, must notify them and give them an opportunity to be heard; to declare the Agreement of October 4, 1955 null and void for failure to give notice and hold an election regarding the Agreement of October 4, 1955; to declare that no person may be compelled to

accept the services of the Brotherhood of Railroad Trainmen so long as that organization refuses membership to persons on account of race, color or creed. The contested Agreement of October 4, 1955 provided for a five day work week, effective December 1, 1955, at an increased rate of pay. Plaintiffs, although admitting that the Brotherhood of Railroad Trainmen was the duly designated and authorized sole collective bargaining agent for their entire craft, at the time of the execution of said agreement, urged that the contract was invalid because: (1) The agreement was made without the giving of notice to the plaintiffs; (2) That a settlement agreement had previously been made and a vote taken in May, 1953, in which the employees indicated that they wished to retain the six day work week, which had since that time remained in effect, and therefore, the said Agreement of October 4, 1955 was illegal and void for that reason; and (3) That the Agreement of October 4, 1955 sought to discriminate against Negro trainmen to reduce the scale of pay and rank of the Negro yardmen, and was discriminatory, oppressive and in violation of the Railway Labor Act, 45 U.S.C.A. § 151 et seq. and denied them an opportunity to be heard or to vote on matters affecting their earnings, seniority and working conditions, and if put into effect, would provide additional pay for white employees and additional jobs for white employees, because of the present system of employing only white persons, no Negroes allegedly having been employed as switchmen since 1944.

[*Hearing*]

The petition was filed on November 28, 1955, and the Court issued a rule nisi, requiring the defendants to show cause within three (3) days, i. e., on December 1, 1955 why a temporary restraining order and injunction should not issue. After the hearing on that date, both of the defendants moved for a dismissal of the complaint for failure to state a claim upon which relief could be granted.

The Court having considered all the evidence introduced, the arguments of counsel and the Law applicable thereto, at the conclusion of the hearing on December 1, 1955, dismissed the plaintiffs' complaint, being of the opinion that the Agreement of October 4, 1955 was valid, and that the plaintiffs were not entitled to an injunction or the relief prayed.

The Court makes the following findings of fact and conclusions of Law:

FINDINGS OF FACT

1. That the Agreement of October 4, 1955 is a mediation Agreement in settlement of differences entered into between the Brotherhood of Railroad Trainmen and the Eastern Carriers' Conference Committee, the Western Carriers' Conference Committee and the Southeastern Carriers' Conference Committee (which includes the Central of Georgia Railway Company,) under the provisions of the Railway Labor Act, as amended.

2. That on March 15, 1949, proposals were exchanged between said Carriers and the Brotherhood of Railroad Trainmen concerning pay and working conditions, etc., of trainmen and other employees; that a Presidential Emergency Board was appointed and conducted a hearing concerning the differences between the parties and filed its report, together with its findings and recommendations, with the President of the United States, resulting in the aforesaid Carriers' Conference Committees (which included the Central of Georgia Railway Company) and the collective bargaining agent, Brotherhood of Railroad Trainmen, entering into an Agreement of May 25, 1951; that the instant Agreement of October 4, 1955 is an amendment to the aforesaid Agreement of May 25, 1951. Neither the Agreement of May 25, 1951, nor the amendment, the Agreement of October 4, 1955, nor the Railway Labor Act as amended requires that the individual members of the craft, such as the plaintiffs, be given notice as a condition precedent to the collective bargaining agent for the craft entering into such agreements, as claimed by petitioners.

3. That the contract of October 4, 1955, though providing for a five day work week, also provides other tangible benefits to the employees, including among other things increases in the rates of pay.

4. That the contract of October 4, 1955 is the result of continuous and extended negotiations between defendants, dating back as far as 1949.

5. That the Brotherhood of Railroad Trainmen is the duly authorized collective bargaining agent for all employees of the craft, including the plantiffs, and has fairly and impartially represented the interests of the entire craft in negotiating with the railroad since 1949, which fact is evidenced by increases in pay for switchmen from $11.46 per day in 1949 to $18.15 per day, which latter rate became effective December 1, 1955, under the contract of October 4,

1955, thus giving these employees since that time a total overall increase of $6.69 per day, while still providing additional benefits to the employee, including a shorter work week.

6. That Negro switchmen have been employed by defendant railroad in the Savannah yard and in other divisions of said Railroad since 1944, and there has been no policy of hiring only white switchmen and not Negroes, as alleged by the petitioners.

7. That under the contract of October 4, 1955, switchmen or yardmen on the Extra Board are first called and the Extra Board exhausted for extra duty before senior switchmen and yardmen are given any priority for overtime work or for additional work to be done on Sundays or holidays, which provides for more even distribution and spreading of the work among all switchmen and yardmen, both young and old, the white senior switchmen being affected equally with colored senior switchmen.

8. The contract of October 4, 1955 is valid and does not discriminate against any special class or group, on account of race, color or creed, including the plaintiffs, but equally affects all persons covered by the Agreement.

9. The collective bargaining agent had authority to represent all members of the craft, including the plaintiffs, and did so fairly and with impartial consideration of the interests of all employees concerned.

10. The vote and purported settlement agreement of May, 1953 does not preclude the bargaining agent from entering into said Agreement, nor require it to hold an election and submit it to the craft for its approval prior to executing same.

CONCLUSIONS OF LAW

1. There being no racial discrimination shown, the plaintiffs were not entitled to notice prior to the execution of the Agreement in question, inasmuch as the Brotherhood of Railroad Trainmen was the duly authorized bargaining agent and representative for the plaintiffs at the time of the making of the agreement, and as such, had authority under the Railway Labor Act to negotiate and enter into such contract in behalf of the craft. The Supreme Court in Steele v. Louisville and Nashville Railroad Company, 323 U.S. 192, at page 202, 65 S.Ct. 226, at page 232, 89 L.Ed. 173, said:

> "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J. I. Case Co. v. National Labor Relations Bd., supra, 321 U.S. [332] 335, 64 S.Ct. [576] 579 [88 L.Ed. 762, 766], but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.
>
> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit * * *."

[*Authority of Agent*]

2. The bargaining agent having authority under the law to contract for changes in wages, hours and working conditions, and there being no discrimination as claimed, the Court will not inquire into the motives prompting such changes. In Pellicer v. Brotherhood of Railway and Steamship Clerks, 5 Cir., 217 F.2d. 205, at page 206, certiorari denied 349 U.S. 912, 75 S.Ct. 601, 99 L.Ed. 1246, the Fifth Circuit Court of Appeals held, to wit:

> "* * * The substance of plaintiff's claim is that any amendment or modification in the provisions of a collective bargaining agreement must operate equally as to all members of the craft without discrimination, and that all must be treated in an identical manner. There is no charge of fraud or bad faith. The law is that changes effectuating differentiations or unequal treatment among employees are not invalid unless some clearly expressed public policy is contravened; and

that in the absence of fraud or bad faith the courts will not inquire into the motives which prompt such changes, nor will they substitute their judgment for that of the bargaining agency on the reasonableness of the modifications."

Also in Ford Motor Company v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 686, 97 L.Ed. 1048, it was held:

"Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

3. The Agreement does not conflict with the express provisions of the Railway Labor Act, nor is it in violation of any constitutional rights of the plaintiffs.

4. The collective bargaining agent representing all of the craft, whether union or nonunion, and the qualifications for membership in the union being a matter relating to the internal affairs of the union, with which Congress has not seen fit to deal, there is no basis for plaintiffs' claim that the contract is not enforceable as a result of their being ineligible for membership in the union.

Whereupon, It Is Considered, Ordered and Decreed that petitioners' prayers for interlocutory injunction and relief are denied and the complaint dismissed.

EMPLOYMENT
Labor Unions—Federal Statutes

R. RICHARDSON et al. v. TEXAS AND NEW ORLEANS RAILROAD COMPANY, et al.

United States Court of Appeals, Fifth Circuit, March 14, 1957, 242 F.2d 230.

SUMMARY: Negro employees of the railroad company in Texas brought a class action in federal district court against the company, the Brotherhood of Railroad Trainmen and local officials of the Brotherhood. The plaintiffs stated that a pre-existing practice of discrimination against Negro employees of the railroad was being perpetuated in the application of a collective bargaining agreement, entered into by the railroad and the Brotherhood as bargaining agent for all employees, in violation of the Railway Labor Act. They sought a declaratory judgment, injunctive relief and money damages against the defendants. The district court found that the suit involved the interpretation of the collective bargaining contract of which primary jurisdiction was vested in the National Railroad Adjustment Board and dismissed the action. 140 F.Supp. 215, 1 Race Rel. L. Rep. 561 (S.D. Tex. 1956). On appeal the United States Court of Appeals, Fifth Circuit, reversed and remanded. The Court of Appeals held that primary jurisdiction to consider cases of this nature does not rest in the Adjustment Board either where discrimination appears upon the face of the contract or where it results from the discriminatory application of an otherwise valid contract.

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

RIVES, Circuit Judge.

A class action was brought by four Negro employees of the Texas and New Orleans Railroad against the Railroad, the Brotherhood of Railroad Trainmen, and certain of its affiliated lodges and officers, claiming unlawful perpetuation by contract of an employment practice, discriminatory against plaintiffs and other Negro yardmen of said Railroad, solely because of their race and color.

[*Facts*]

In substance, the complaint alleges that plaintiffs are Negro yardmen employed by appellee Railroad, who are represented for collective bargaining purposes by the Brotherhood, though they are excluded from membership therein; that they were originally employed by the Houston & Texas Central Railroad, but, upon the merger and consolidation of its operations with those of the Texas & New Orleans Railroad many years ago, all Houston & Texas Central Railroad yardmen affected by the merger were designated "H&TC Protected Men," while all Texas and New Orleans Railroad yardmen were designated as "T&NO Protected Men"; that, during the period since such merger, the "H&TC Protected Men" had become composed exclusively of Negroes, and the "T&NO Protected Men" exclusively of white men; that a custom or practice had existed whereby all Negro "H&TC Protected Men" were permitted to act as engine foremen when the train crew was composed entirely of Negroes, but when it became necessary to designate white "T&NO Protected Men" to serve with an "H&TC Protected" crew, one of the white men served as engine foreman with a higher rate of pay, even when he had less seniority and was no more competent than Negro "H&TC Protected Men" of the same crew; that this pre-existing discriminatory practice was formally perpetuated by the Brotherhood and the Railroad in their September 25, 1952 collective bargaining agreement, by inclusion of the fifth section thereof, as follows:

> "5. The present arrangement for filling vacancies for engineer foremen with T&NO yardmen on H&TC Protected crews going on and off duty at the Houston Passenger Station is satisfactory and no change therein will be made under this agreement."

The complaint further alleges that the quoted provision was agreed upon between the Brotherhood and the Railroad without any prior notice to plaintiffs, and without affording them an opportunity to be heard; that both the Railroad and the Brotherhood have since enforced "said illegal agreement and the discriminatory arrangement contracted for therein" to the prejudice of the seniority rights of plaintiffs, and with consequent loss to them of income and retirement benefits; and that, in the making of said agreement, the Brotherhood acted in derogation of its statutory duty under the Railway Labor Act to represent plaintiffs fairly and impartially, and used its position as majority bargaining representative under the Act for the purpose of discriminating unfairly against plaintiffs and others of their class. The complaint prays for a declaratory judgment that the agreement and discriminatory practice perpetuated thereby are illegal and void, and "that the action of the Brotherhood and the Railroad Company in entering into and enforcing Section Five (5) of the Agreement * * is in violation of the Railway Labor Act;" that appellees be enjoined from further enforcement, and "that each plaintiff be awarded $5,000.00 compensatory damages against the Brotherhood and the Railroad Company and * * $50,000.00 against the Brotherhood as punitive damages," as well as attorneys' fees and costs.

[*Action of Court Below*]

The district court granted appellees' motions to dismiss the complaint for lack of jurisdiction, upon the ground that the complaint seeks adjudication of a dispute between employees and their carrier-employer under Section 3 of the Railway Labor Act, and is a controversy requiring interpretation and application of a collective bargaining agreement cognizable in the first instance by the National Railroad Adjustment Board under General Committee v. M-K-T R. Co., 320 U.S. 323, and this Circuit's decision in Conley v. Gibson, 229 F.2d. 436, affirming 138 F.Supp. 60, certiorari granted, 352 U.S. 818, 819, and Hampton v. Thompson, 171 F.2d. 535.

[*Steele Precedent*]

Appellants insist that the court's dismissal was incorrect because the facts alleged required the court to assume jurisdiction to redress the discrimination under such decisions as Steele v. Louisville & Nashville R. Co., 323 U.S. 192; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210; Graham v. Brotherhood of Firemen, 338 U.S. 232; Railroad Trainmen v. Howard, 343 U.S. 768; the decisions of the Fourth Circuit in Rolax v. Atlantic Coast Line R. Co., 186 F.2d. 473, and Dillard v. Chesapeake & O. R. Co., 199 F.2d. 948; and this Court's decisions in Brotherhood of Locomotive Firemen v. Mitchell, 190 F.2d. 308; and Central of Georgia R. Co. v. Jones, 229 F.2d. 648, cert. denied 352 U.S. 848. Appellants rely particularly upon the Steele Case, supra, as establishing that no interpretation of the application of an existing

bargaining agreement justifies relegating such discriminatees to any supposed administrative remedy before the National Railroad Adjustment Board where, as here, the complaint alleges a judicially cognizable breach of the bargaining representative's statutory duty not to discriminate against Negro employees of a craft or class represented because of their race or color. They further insist that the district court's reliance upon the General Committee Case, *supra*, was misplaced since that case was decided more than a year before the Steele decision, in which the Supreme Court, with express reference to the General Committee Case, held that there was no adequate administrative remedy available to redress discrimination caused by the breach of such statutory duty, and consequently that the failure to apply to the Board for relief does not foreclose judicial inquiry.

[*Slocum Case*]

The Brotherhood and its affiliated lodges and officers, as appellees, rely upon another line of Supreme Court authority typified by such decisions as Slocum v. Delaware, L&W R. Co., 339 U.S. 239,[1] and upon the Ninth Circuit's decision in Hayes v. Union Pacific R. Co., 184 F.2d. 337, followed by this circuit in Hettenbaugh v. Air Lines Pilots Ass'n International, 189 F.2d. 319, the Hettenbaugh case having been recently followed in the per curiam affirmance of the district court's decision in Conley v. Gibson, supra,—all as supporting their insistance that action based upon an alleged discriminatory administration and performance of a valid railway bargaining agreement, rather than upon an agreement discriminatory in express terms, are within the exclusive jurisdiction of the Board. The Brotherhood interprets the holdings in the Steele Case, supra, and decisions in accord, as authorizing judicial relief "only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect," as the Ninth Circuit held in the Hayes Case, *supra*, at p. 338, and insists that those decisions do not charge the federal courts with the duty of policing the impartial administration of agreements between the railroad union and its carrier-employer, which, like Section Five of the contract heretofore quoted, are not discriminatory upon their face. The Brotherhood also urges alternatively that, in so far as the complaint alleges its failure to process appellants' grievances, and fails to aver that appellants have previously sought and been denied relief through timely presentation of their grievances to their carrier-employer and the Board in the manner prescribed by the bargaining agreement,[2] it was subject to dismissal for failure to state a claim upon which relief could be granted.

[*Railroad's Contention*]

The Railroad joins in the Brotherhood's main insistence that the Steele, Tunstall, and other Supreme Court decisions relied upon by appellants are not controlling in favor of jurisdiction where, as here, the suit seeks judicial enforcement of an asserted right to the impartial application and administration of a railway bargaining agreement which is not discriminatory per se, a situation which the Railroad urges precipitates a controversy between employees and their carrier-employer requiring interpretation of the bargaining agreement, over which the Board has "exclusive primary jurisdiction" under the Act. Otherwise stated, the Railroad's argument is that, when proof of perpetuation of a pre-existing employment practice and custom must necessarily be adduced to determine whether a bargaining agreement valid in terms is being administered in a discriminatory fashion, the employees complaining of such discriminatory treatment are relegated in the first instance to their administrative remedy under the General Committee and Pitney Cases, *supra*, especially since the complaint here contains no allegations that appellants have been deprived by their bargaining representative of any pre-existing "vested employment rights," as was the situation in the Steele and Tunstall cases, *supra*, but the complaint simply avers perpetuation prospectively by agreement of a long-existent employment practice and custom. The Railroad further joins in the Brotherhood's alternative insistence that the action was improvidently brought, absent any allegation that appellants first sought redress through negotiation, conciliation, or prior resort

1. See also Order of Conductors v. Southern R. Co., 339 U.S. 255; Order of Conductors v. Pitney, 326 U.S. 561; cf. Moore v. Illinois Central R. Co., 312 U.S. 630.

2. The agreement between the Railroad and the Brotherhood provides in pertinent part as follows: "Yardmen having grievances will present them within ninety days from the date they are first aggrieved. In the event of their failure to do so, their rights to make complaints shall cease. * * * * This Article not to apply to seniority lists."

to their supposed administrative remedy before the Board. The Railroad further urges, solely in its own behalf, our re-consideration of the decision of a majority of that panel of this Circuit which rendered the per curiam affirmance in Central of Georgia R. Co. v. Jones, 229 F.2d. 648, cert. denied 352 U.S. 848, in so far as the Railroad was held jointly liable with the Brotherhood for damages for breach of the latter's implied statutory duty not to discriminate, it being urged that the dissenting view in the Jones Case, supra, correctly states the law, and that in such situations the carrier can, at most, be enjoined prospectively from enforcing such agreement or negotiating any future agreements with the Brotherhood found discriminatory and unlawful.

[*Steele Case Controls*]

With the material allegations of the complaint set forth, with the contentions so framed, and practically all of the authorities of major pertinence cited and read, the jurisdictional issue seems to us clear. We think the allegations of the complaint bring it within the rationale of the Steele decision, rather than the rule of the General Committee Case, upon which the district court mainly relied. Notwithstanding the Railroad's contrary insistence, it seems to us that the real distinction differentiating this type controversy from that under consideration by the Court in such cases as General Committee, Slocum, and Pitney is that those decisions involved "jurisdictional disputes" between rival unions as to their representation authority, and the rule requiring prior exhaustion of the administrative remedy was there invoked because the Court apparently felt that the resolution of that type dispute, non-existent here, was peculiarly within the competence of the Adjustment Board. However, even assuming an adequate administrative remedy to redress the discrimination here alleged, the rule of General Committee and Slocum, *supra*, is not applicable to foreclose judicial relief upon such allegations of a breach of the statutory representatives' implied duty to bargain impartially for the benefit of all members of the craft represented, without discrimination because of their race or color. That was clearly implied by Mr. Chief Justice Stone in his subsequent opinion for the Court in Steele, supra, at pages 204-205.

[*Not Discriminatory on Face*]

While it is true that Section Five of the bargaining agreement, read in isolation and out of context from other portions of the complaint, is not discriminatory upon its face, the surrounding provable facts and circumstances make it discriminatory, and the complaint read as a whole charges essentially that same unlawful breach of the bargaining representatives' implied statutory duty of impartial representation held actionable by the Court in the Steele and Tunstall decisions. Here, as in Steele, the allegations of the complaint require no interpretation or administrative application of the bargaining agreement within the special competence of the Adjustment Board, which forecloses judicial relief under Section 3 of the Act. Indeed, it appears to us that Section 3 is not applicable to justify relegating the parties to any supposed administrative remedy before the Board where, as here, the main cause of action is alleged against the bargaining representative, to which the dispute between the employees and their carrier-employer is subordinate and ancillary. But, whether this be true or not, we adhere to our conclusion that jurisdiction over such a controversy exists, irrespective of whether the representatives' breach of its statutory duty involves a deprivation of so-called "vested employment rights" under a bargaining agreement discriminatory in express terms, as in Steele, or results, as here, from perpetuation prospectively by a bargaining agreement possibly valid upon its face of a pre-existing discriminatory employment practice. In either event, an actionable breach of the bargaining union's statutory duty rendered the complaint justiciable under the Steele Case results, the particular form of enforcement of such discrimination being only a matter of proof. Any other rule would permit a bargaining union and its railroad-employer to practice or perpetuate jointly, through custom and under an agreement innocuous in terms, that every abuse of the bargaining representatives' power of representation directly proscribed by the Steele and Tunstall decisions.

[*Conley v. Gibson Distinguished*]

Whatever implications may be drawn from this Court's previous decisions in Conley v. Gibson, in which certiorari has recently been granted, and Hampton v. Thompson, our re-examination of the jurisdictional issue convinces us that the

absence of any allegation as to the existence of a bargaining agreement discriminatory upon its face is not determinative, and does not foreclose judicial inquiry where the complaint seeks redress for discriminatory representation in violation of the bargaining union's implied statutory obligation to bargain impartially for all, and neither seeks nor requires any administrative inquiry into the fair administration of a bargaining agreement valid in terms. Adoption of this view by the Supreme Court in the Gibson Case would, of course, be dispositive of this same issue here; but, even if the Court affirms the Gibson Case on this point, it seems to us that the allegations of this complaint would still support jurisdiction under the Steele decision and our recent decision in Central of Georgia R. Co. v. Jones.

[*Liability of Railroad*]

We have also carefully considered the Railroad's alternative insistence that nothing more than injunctive relief may be enforced against it, and that in no event may it be held liable for damages for any subsequently proven breach of the Brotherhood's statutory duty not to discriminate. This is simply a renewal of the identical argument recently rejected without comment by a majority of the panel which decided Central of Georgia R. Co. v. Jones. Notwithstanding this fact, we have re-appraised the problem in the light of the Railroad's arguments and the dissent in the Jones Case, but, for reasons hereafter stated, we are still unpersuaded from our tacit holding in Jones that the Railroad is jointly liable in damages along with the Brotherhood.

True, the Congress has not enacted any so-called Fair Employment Practices Code preventing the Railroad, of its own volition, from discriminating solely on account of race or color. It has, however, imposed directly upon the Railroads the duty to "make and maintain agreements" in compliance with the provisions of the Railway Labor Act, the first paragraph of Section 3 of that Act (45 U.S.C.A. 152) providing:

> "First. *It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements* concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (Emphasis supplied.)

Further, the Railroad, in entering into the contract, was charged with knowledge that the Brotherhood as the statutory representative of its employees was under a duty to represent all employees for whom it acted fairly, impartially, in good faith and without hostile discrimination. Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 203-204, 207; Rolax v. Atlantic Coast Line R. Co., *supra;* Dillard v. Chesapeake & O. R. Co., *supra;* Central of Georgia R. Co. v. Jones, *supra.* Cf. the dissenting opinion in Syres v. Oil Workers International Union, 5th Cir., 223 F.2d. 739, 745, reversed 350 U.S. 892.[3]

The contract should be read as if the void discriminatory provision did not exist. It then becomes clear that the Railroad has deprived the Negro yardmen of job assignments and pay to which they were entitled by other provisions of the contract.[4]

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3. In an analogous situation under the National Labor Relations Act, the Supreme Court said:
"The company, it is said, bargained with Independent because it was compelled to do so by law. The union shop contract to which the company at first objected, but into which it entered against the advice of counsel, was the result of that bargaining. The company, it is pointed out, persistently though unsuccessfully sought to persuade Independent to admit C.I.O. workers as members of Independent. Hence, we are told, the company did all in its power to prevent the discharges and should not be held responsible for them. Two answers suggest themselves: First, that the company was not compelled by law to enter into a contract under which it knew that discriminatory discharges of its employees were bound to occur; second, the record discloses that there was more the company could and should have done to prevent these discriminatory discharges even after the contract was executed." Wallace Corp. v. Labor Board, 323 U.S. 248, 256-257.

4. For example, Sections 2 and 3, as follows:
"2. When an extra yard engine is called the senior yardman on hand at starting time who has registered his desire to work as extra engine foreman and whose regular job as a helper has the same starting time and on-duty location as the extra engine called, will be used as engine foreman, and as between extra men called for extra yard engine, seniority will govern in filling vacancies on the extra yard engine and the vacancy for helper in place of regular helper used as foreman. If there are no regular helpers who have registered to work as extra engine foreman, the senior regular helper on hand at the same starting time and on-duty location qualified and willing to work as foreman will be used, and if there is not a regular helper who has registered to work as engine foreman or a regular helper qualified and willing to work as engine foreman, as provided for herein, the senior extra yard

"The void and discriminatory agreement which it entered into with the Brotherhood will no more protect it than it will protect the Brotherhood from liability for the loss occasioned to those who were injured thereby." Rolax v. Atlantic Coast Line R. Co., 186 F.2d. at pp. 480-481.

It takes two parties to reach an agreement, and both have a legal obligation not to make or enforce an agreement or discriminatory employment practice which they either know, or should know, is unlawful. Unless financially responsibility for a joint breach of such duty is required from both sides of the bargaining table, the statutory policy implied under Steele will be impracticable of enforcement. For the foregoing reasons, we think the Brotherhood's obligation under the statute does not exist in vacuo, unsupported by any commensurate duty on the part of the carrier.

The Railroad may not have been the Brotherhood's keeper for bargaining purposes, but we think that, under the allegations of this complaint, it can be required to respond in damages for breach of its own duty not to join in causing or perpetuating a violation of the Act and that policy which it is supposed to effectuate.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

REVERSED AND REMANDED.

man called for the extra engine will be used as engine foreman.

"3. In filling vacancies as engine foreman on regular yard engines, a regular helper on that crew will be used; the senior regular helper to have preference. Should a vacancy exist on his regular crew for foreman, a regular helper who has registered for service as extra engine foreman will have the choice of working as foreman of the extra engine, or as foreman on his regular engine if no helper senior to him on that crew desires the vacancy."

EMPLOYMENT
Labor Unions—Wisconsin

Randolph ROSS et al. v. Charles EBERT, as Business Agent of the Bricklayers, Masons, Marble Masons Protective International Union No. 8, et al.

Supreme Court of Wisconsin, April 9, 1957, 82 N.W.2d 315.

SUMMARY: Two Negro bricklayers in Wisconsin brought a complaint before the Industrial Commission of Wisconsin against the Bricklayers International Union No. 8, alleging that the union had refused them membership because of their race. The Commission held hearings on the complaint and made findings that discrimination had been practiced. The Commission recommended that the union admit the two persons to membership. The complainants then filed an action in a Wisconsin state court seeking to require their admission to the union based on the findings and recommendations of the Industrial Commission. The court held that under the state "Fair Employment Statute" the recommendations of the Industrial Commission were not judicially enforceable. The court further held that, in the absence of a statute, the complainants had no constitutional right to be admitted to the union. 2 Race Rel. L. Rep. 151 (1956). On appeal the Wisconsin Supreme Court affirmed, one justice dissenting, holding that the action of the union was not "state action" so as to subject it to the requirements of the Fourteenth Amendment, and that the plaintiffs had obtained all the relief to which the Wisconsin statute entitled them.

[STATEMENT OF FACTS BY THE COURT.]

The judgment of the circuit court sustained defendants' demurrer and dismissed plaintiffs' complaint on the merits.

Plaintiffs are two negroes who wish to join the masons and bricklayers labor union and whose application for membership is ignored by defendants who are officers and, in this action, the representatives of the union. Plaintiffs' action seeks to compel the union to accept them as members.

The complaint alleges that the union is an unincorporated association of bricklayers and masons who have associated themselves together

for their mutual benefit in matters of employment; that plaintiffs are qualified in every way for union membership and their application for membership is in due form but they are excluded by the union solely because of their race and color. These allegations are admitted by the demurrer. The complaint alleges, further, that the refusal of the union to admit them results in their failure to secure employment which would otherwise be theirs, thus causing loss and damage to them. This, too, is admitted. The complaint goes on to state that plaintiffs complained to the Industrial Commission as permitted by sec. 111.31, Stats., and, as authorized by that section, the commission conducted an investigation, determined that the exclusion was solely on racial grounds, made a recommendation to the union that it admit plaintiffs to membership—which the union disregarded—and gave publicity to its findings. The truth of these allegations is admitted also. Conclusions of law, which the demurrer does not admit, are that the Wisconsin constitution or statutes give them a right of action to compel the cessation of discrimination on racial grounds practiced against them in matters relating to their employment.

Defendants demurred to the complaint because, (I) the court had no jurisdiction of the subject of the action, and, (II), that it did not state facts sufficient to constitute a cause of action. The circuit court, by judgment, sustained the demurrer on both grounds and dismissed the complaint upon the merits. The plaintiffs appeal.

Additional facts will be stated in the opinion.

OPINION

BROWN, J.

Appellants' first contention is that the circuit court had jurisdiction to order the bricklayers union to admit appellants to membership. For support of this contention they rely principally on sec. 9, art. I, Wis. Const., reading as follows:

> "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the law."

This constitutional provision has frequently been construed to declare that the wrongs contemplated by this language are those resulting from an invasion of a party's legal right. Not long ago this court so stated in Scholberg v. Itnyre (1953), 264 Wis. 211, 58 N.W. (2d) 698. Unions in the past and at present in this state (unless we now decide differently) are voluntary associations to which members may be admitted by mutual consent but into which applicants either by their own efforts or by the aid of the courts cannot force themselves against the will of those already members.

> "*Conditions as to Membership.*—Like other associations, trade unions may prescribe qualifications for membership. They may impose such requirements for admission and such formalities of election as may be deemed fit and proper. Moreover, they may restrict membership to the original promoters, or limit the number to be thereafter admitted. No person has an abstract or absolute right to membership." 31 Am. Jur., Labor, Sec. 58, p. 861.

> "*Generally.*—Membership in a voluntary association is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. The courts cannot compel the admission of an individual into such an association, and if his application is refused, he is entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion. The acceptance of, or intention by the person in question to accept, membership in an unincorporated association is necessary to make him a member of the organization." 4 Am. Jur., Associations and Clubs, Sec. 11, p. 462.

It may be disadvantageous to an individual not to be chosen for membership in a voluntary association but the courts hitherto have been powerless to compel the association to receive him. His exclusion has not been a wrong of which the courts have cognizance by virtue of sec. 9, art. I, Wis. Const.

[*Effect of Fair Employment Code*]

Appellants, however, have some reason to say that the Fair Employment Code, Secs. 111.31-36, Stats., first enacted in 1945, has altered matters and that exclusion from a labor union because

of the applicant's color deals him an injury which the state recognizes as a legal wrong for which there must be legal redress. The language of the statute from which appellants strive to draw such a conclusion is found in sec. 111.31 (1), Stats., thus:

> "The practice of denying employment and other opportunities to, and discriminating against, properly qualified persons by reason of their race, creed, color, national origin, or ancestry, is likely to foment domestic strife and unrest, and substantially and adversely affect the general welfare of a state by depriving it of the fullest utilization of its capacities for production. The denial by some employers and labor unions of employment opportunities to such persons solely because of their race, creed, color, national origin, or ancestry, and discrimination against them in employment, tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, *thereby committing grave injury to them.*" (Our emphasis.)

If ch. 111 stopped there perhaps appellants might have something. But it does not; in sec. 111.31 (3), Stats., it continues:

> "In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their race, creed, color, national origin, or ancestry. All the provisions of this subchapter shall be liberally construed for the accomplishment of this purpose."

[*Discrimination Not Illegal*]

Racial discrimination in employment, so far, is not declared to be illegal. It is pronounced undesirable and the announced public policy of the state is to encourage and foster employment without such discrimination to the fullest extent practicable. "Encourage and foster": no slightest reference to "require" or "compel". In the matter of racial discrimination in public accommodations the discrimination is declared to be illegal and penalties are provided for the innkeeper, barber or public carrier, for instance, who discriminates. Sec. 340.75, Stats. Nothing of the sort is found in secs. 111.31-36, Stats. Reading secs. 111.31 to 111.36 in their entirety we are unable to find that the legislature created a new right—one giving to a colored applicant an enforceable right to union membership over the objection, on racial grounds, of the members already there. But if such right was created we must look to the statute to see if the remedy or penalty for a violation is provided. If it is, that remedy is exclusive. State ex rel. Russell v. Board of Appeals (1947), 250 Wis. 394, 397, 27 N.W. 378; LeFevre v. Goodland (1945), 247 Wis. 512, 516-517, 19 N.W. 884. Where the law gives a new remedy to meet a new situation, the remedy provided by the law is exclusive. In re Jeness (1935), 218 Wis. 447, 450, 261 N.W. 415.

[*Rights Under Code*]

So looking, we discover that one believing that he is the victim of racial discrimination in matters affecting his employment may apply to the Industrial Commission which may then investigate the complaint and give publicity to its findings. The commission may also make recommendations to the interested parties. Secs. 111.35, 111.36, Stats. The complaint alleges that the commission held hearings in this matter, found that the union, or its responsible officers, the respondents, had discriminated against appellants because of their color, and the commission had given publicity thereto and had recommended to the union that it accept the two appellants as members. Investigation, publicity and a commission recommendation are what the statute provides in consequence of racial discrimination practiced by an employer or a union. We grant it is cold comfort to appellants but it is all the legislature saw fit to provide. Evidently it was the opinion of that body that the public policy declared by sec. 111.31 (1) and (3), Stats., is better served by peaceful persuasion and moral pressure than by force for the statute did not in this Code even give the Industrial Commission the power to make orders directing compliance with the declared public policy. The commission may only recommend. We must conclude, then, that moral force, aroused by the findings, publicity and recommendations of the commission is consistent with the intent of the legislature in this enactment and compulsion of a union (or of an employer if he is the discriminator) under a decree of a court, is not.

We are confirmed in this conclusion when we

note that the first enactment of sec. 111.31 to sec. 111.36, Stats., was by the legislature in 1945. The bill, as introduced, (Senate Bill No. 131), gave power to the Industrial Commission to order violators to cease and desist and gave the courts power to review and to enforce such orders. That is what appellants ask the court to do now. Before passage the bill was amended and the powers to order and to enforce were removed. As so amended the bill was enacted into law. By Assembly Bill 357 A in 1951 and Assembly Bill No. 390 A in 1955 amendments restoring the compulsory features were introduced in the legislature but both failed of passage. In the recent "right of privacy case", Yoeckel v. Samonia (1956), 272 Wis. 430, 75 N.W. (2d) 925, we said:

> ". . . particularly because of the refusal of the legislature at two sessions to recognize even a limited right to protection against invasion of the right of privacy, we are compelled to hold again that the right does not exist in this state."

We are convinced that the legislature purposely denied enforcement provisions in the Fair Employment Code and for us to restore what the legislature struck out would be legislation, not interpretation or construction of the statute. And here there could be no pretense that the court is reading into the statute something consonant with the intent of the legislature but left out through inadvertence or lack of foresight. The statute's history up to the last legislative session emphasizes that there is more to contend with here than an inadvertent omission. The principle of compelling compliance with the purpose of the legislation has been three times intentionally rejected. A clearer declaration of a non-compulsory public policy is hard to imagine. For the court to read into the statute that which the legislature has thrice refused to include would be not only a reversal of the legislative intent but a gross invasion of the legislative field in order to do so.

[*Fourteenth Amendment*]

So far we have considered the issue from the standpoint of the state constitution and statutes. In addition to alleging that they have been violated, the complaint alleges that this discrimination against appellants by the union is a violation of sec. 1 of the Fourteenth Amendment to the constitution of the United States. The pertinent part of that Amendment is:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

From this language alone it would seem to be clear that only discrimination *by state action* is within its contemplation; and the Supreme Court of the United States has so interpreted it, saying, in Shelley v. Kraemer (1948), 334 U.S. 1, 13, 92 L.Ed. 1161, ". . . the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Appellants' citations referring to the amendment are Plessy v. Ferguson (1896), 163 U.S. 537, 41 L.Ed. 536, and Brown v. Board of Education of Topeka (1954), 347 U.S. 483, 98 L.Ed. 873. The former opinion approved segregation and the latter disapproved it, but both cases arose from discrimination directed by the state or its agency. In Shelley v. Kraemer, supra, the United States Supreme Court held that the enforcement by a state court of a covenant between private parties discriminating against negroes in the occupancy or ownership of land was state action denying equal protection of the laws and, hence, a violation of the Fourteenth Amendment. But the court went on to say, 334 U.S. 1, 13, 92 L.Ed. 1180, ". . . So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." The instant complaint does not allege any state action in aid of the discrimination practiced here. On the contrary, the state deplores it and through the good offices of its Industrial Commission has sought to end it. The state withholds no benefits from negroes which it grants to Caucasians or others. They are as free as other citizens are to form labor unions with all the rights and privileges of other labor unions, and as free, so far as the state is concerned, to join any existing unions which will have them. The present discrimination is by private persons acting privately. It cannot fairly

be said to be the action of the state and therefore its practice is not prohibited by the Fourteenth Amendment.

[*Steele Case*]

Instructive, too, are the words of the United States Supreme Court in Steele v. L. & N.R. Co. (1944), 323 U.S. 192, 89 L.Ed. 173. The federal Railway Labor Act constituted the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor organization, the exclusive bargaining representative of the whole craft, whether members of the Brotherhood or not. Many firemen were negroes. They were not members of the Brotherhood and by its constitution were not eligible to membership. The Brotherhood negotiated agreements with certain railroads which deprived negroes of employment and filled their places with white men. The court said, at p. 204, that "While the statute *does not deny to such a bargaining labor organization the right to determine eligibility to its membership*", it does require the union in collective bargaining to represent non-union members of the craft without hostile discrimination. It is noteworthy that the constitution of the Brotherhood barred negroes from membership, yet the court recognized the legal right of a voluntary association so to discriminate. In like manner we find nothing in Wisconsin law denying to a labor union a legal right to determine the eligibility of its membership, nor can we find this court charged with a duty, or a right, to compel such a union to take in applicants who are unacceptable for any reasons, color among them, and thereby turn voluntary associations into involuntary ones.

[*Effect on Union*]

We do not attempt to say what effect the union's racial discrimination against the two appellants, as found and publicized by the Industrial Commission, in defiance of the announced public policy of the state, might have in the union's enjoyment of rights to state assistance in maintaining statutory benefits given labor organizations. The only question before us now is what, if any, relief can be given appellants by the state courts in response to their complaint. We must reply that the measures already taken by the Industrial Commission provide the entire remedy given by law in the premises and their complaint did not state a cause of action which the trial court had jurisdiction to entertain.

By the Court—Judgment affirmed.

DISSENT

FAIRCHILD, J. (dissenting)

I respectfully disagree with the majority.

The crucial question is whether members of a union are the sole arbiters of those with whom they desire to associate and can exclude applicants against whom the members have no grievance except that the applicants belong to a different race or creed.

The majority of the court consider the union as a voluntary association with no more restriction upon its power to admit or reject applicants than would be imposed on a group of people associated for purely social or fraternal purposes.

I am of the opinion that a difference should be recognized in this respect between unions and other voluntary associations and that the courts should give substance to a principle that members of unions do not have the right to exclude people from the enjoyment of the benefits of membership solely on grounds of race or religion.

We are engaged in a struggle to make equality and freedom realities for all Americans. In addition to political equality, the full availability to everyone of education and full opportunity for employment to the extent of his capacity are generally considered the basic essentials in order to erase from America anything which could be termed "second class" citizenship.

[*Union Activities*]

The disadvantage to an otherwise qualified applicant who is excluded from membership in a union is clearly substantial. In the eyes of many people in the community, a stigma attaches to him because he is non-union. Unions properly strive for and often attain for their members advantages in gaining or retaining employment. Persons indifferent to the principles of organized labor nevertheless often prefer to employ union labor because of the attitude of others toward employers who do not. Of course there are a multitude of reasons why a union might validly exclude an applicant. There may be applicants whose conduct or views demonstrate that they would not be good members. Some applicants

will fail to meet proper objective standards germane to the purposes of the union. In the nature of things, union members and officers should enjoy wide discretion and presumptions that they act in good faith. Such latitude should not only be tolerated but should be protected because it may be generally assumed that the members of a union act in good faith to achieve their legitimate purposes. Exclusion of persons from membership solely because of their race can not, however, possibly contribute to the advancement of the legitimate causes of the union. Where an applicant meets every reasonable standard and is excluded solely because he is a negro or belongs to some other racial or religious group, the injustice done him is obvious and it is great.

To be the butt of social discrimination is unpleasant in high degree, but to be denied the economic opportunity to work out one's destiny as best he can, solely because of a racial or religious difference, impairs the very substance of citizenship itself. Perhaps the degree of the impairment is so great and the character of the rights impaired so fundamental that the wrong must be recognized and remedied by the judicial branch even in the absence of action by the legislature.

[*Equal Protection Denied*]

But there is another reason in any event for denying members of a union the right to exclude people of a different race or creed. Plaintiffs have an unquestioned constitutional right to equal protection of the laws of this state. Fourteenth Amendment, U.S. Constitution. If it be proved that defendant union is excluding plaintiffs because of their race, then the union is denying them the equal protection of the laws of the state concerning the right of organization and collective bargaining in employment relations. This is a wrong which a court of equity ought to prevent.

Sub-chapter I, Chapter 111 of our statutes, the "employment peace act," creates duties and obligations as well as an administrative agency for the purpose of protecting the rights of employees in the matter of employment relations. It expressly recognizes the interest of the employee in regular and adequate income and that this right among others is largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. The act expressly recognizes the importance of voluntary agreement between employer and employees as to terms and conditions of work and recognizes the right of an employee to associate with others in organizing and bargaining collectively through representatives of his own choosing.

[*Action of State*]

The act further makes available to those employees who do desire to organize, a state agency which has the duty of protecting them in their activities both in the matter of organization and collective bargaining. It is implicit that the protection which is thus made available to employees is considered by the legislature to be valuable both to the employees and to the general public. The act provides that certain activities on the part of employers are unfair and gives resort to the employment relations board in order to prevent the continuance of those practices. Granted that restrictions are also imposed upon employees; that some or all of these restrictions might not legally exist except for the act; and that there are vigorous differences of opinion as to whether a law which imposed fewer of such restrictions might be more just, nevertheless, it is clear that the right of individual employees to organize is a substantial and valuable one and that the laws regulating employment relations have given greater substance and value to these rights.

Does any voluntary organization of employees enjoying these rights and the protection of the employment peace act have the right to exclude from the enjoyment of such protection persons of a different race solely for that reason? My answer is "No."

Under the Fourteenth Amendment the state must not deny to any person within its jurisdiction the equal protection of the laws. Obviously the state could not include in its regulatory laws any provision making negroes ineligible for membership in labor unions.

[*Action by Court Required*]

It has now been made clear by the Supreme Court of the United States that a state court must not enforce a private contract to exclude persons from the ownership or enjoyment of property because of their race. Shelley v. Kraemer, 68 S.Ct. 836, 334 U.S. 1, 92 L.Ed. 1161, 3 A.L.R. 2d.

441; Barrows v. Jackson, 73 S.Ct. 1031, 346 U.S. 249, 97 L.Ed. 1586. It seems clearly to follow that if a union had a constitution which restricted its membership on the grounds of race the courts could not enforce that restriction.

It may also follow that when a state court denies relief to persons excluded from the equal protection of the law by a labor union, such denial is itself a violation of the Fourteenth Amendment. In any event, however, the granting of relief to plaintiffs by a court would protect their rights under the Fourteenth Amendment and that fact alone is a sufficient basis for such action by the court.

It may be said that the plaintiffs could form a new union and that they would then gain for themselves the same legal rights of the members of defendant union, but the plain facts of economic life demonstrate that the possibility of so small a minority forming an effective organization when the defendant is already established in the field is illusory.

As the case now stands it has not been heard upon the merits. Except for the apparent fact that the industrial commission was satisfied that the rejection of plaintiffs was solely by reason of their race, it has not yet been established with finality that the charges made by the plaintiffs are true. In my opinion the order sustaining the demurrer should be reversed and the case sent back for hearing upon the merits. If it be proved as charged that the rejection of plaintiffs was solely because of their race, defendants should be ordered to accept plaintiffs into membership. In doing otherwise the court is permitting (if the charges are true) the present members of defendant union to exclude other people, merely because of their race, from the full protecting afforded by our employment statutes and the agency which administers them.

TRIAL PROCEDURE
Argument of Counsel—Louisiana

STATE of Louisiana v. Cornelia NEAL.

Supreme Court of Louisiana, January 21, 1957, 93 So.2d 554.

SUMMARY: The defendant, a Negro, was convicted in a Louisiana state court of attempted manslaughter. On appeal to the Louisiana Supreme Court she contended that the trial court should have granted a new trial. The basis for the motion for a new trial was an alleged appeal to racial prejudice by the district attorney in his closing argument. The court held that while an appeal to racial prejudice will be grounds for a mistrial, the criminal defendant must take exception to such remarks at the time of their occurrence. Otherwise the failure to object operates as a waiver. A portion of the opinion by HAWTHORNE, J., follows:

Defendant Cornelia Neal, a Negro woman, was charged with the crime of attempted murder, tried, convicted of attempted manslaughter, and sentenced to serve six years at hard labor in the state penitentiary. She has appealed.

* * *

Appellant next contends that the trial judge erred in overruling her motion for a new trial. In this motion appellant for the first time makes objection to an alleged remark of the district attorney in his closing argument to the jury to the effect that he and the sheriff of the parish were not going to stand for any Mississippi Negroes coming to Louisiana and terrorizing the community in these juke joints. It is appellant's contention that this remark was an appeal to race prejudice and as such entitles her to a new trial.

Under Article 381 of the Code of Criminal Procedure, "Counsel may argue to the jury both the law and the evidence of the case, but must confine themselves to matters as to which evidence has been received, or of which judicial cognizance is taken, and to the law applicable to the evidence; and counsel shall refrain from any appeal to prejudice".

[*No Timely Objection*]

The accused, as stated above, did not object to the remarks of the district attorney at the

time they were made, and according to our law the objection and exception to the remarks must be taken when the remarks are made and not after conviction in a motion for a new trial. State v. Spurling, 115 La. 789, 40 So. 167; State v. Digilormo, 200 La. 895, 9 So.2d 221; State v. Wilson, 217 La. 470, 46 So.2d 738.

The Code of Criminal Procedure of this state provides that no error not patent on the face of the record can be availed of after verdict unless objection has been made at the time of the happening and unless at the time of the ruling on the objection a bill of exception shall have been reserved to such adverse ruling. The Code provides also that to avail as a ground for a new trial any irregularity in the proceedings not patent on the face of the record must be objected to at the time of its occurrence and a bill of exception reserved to the adverse ruling of the court to such objection, and failure to reserve a bill at the time of the ruling operates as a waiver of the objection and as an acquiscence in the ruling. Arts. 502, 510.

Under the express provisions of these articles appellant has no cause for complaint. However, the serious question here is whether the remarks of the district attorney, if they are considered as an appeal to race prejudice, are so prejudicial as to entitle the accused to a new trial in spite of the provisions of these articles of our Code.

[*Not Cured by Instruction*]

It is well settled that in general an appeal to race prejudice cannot be cured by a charge of the judge to disregard and is reversible error. The question then is whether appellant's failure to object at the time the remarks were made operates as a waiver of her objection to them.

If the remarks made in this case are considered as an appeal to race prejudice, the accused by objecting would have been entitled under the jurisprudence to a mistrial. However, she elected not to make any objection to the remarks. In other words, she chose to remain silent and take the chance of a favorable verdict, and after an unfavorable verdict she urges the objectionable remarks as a ground for reversal for the first time in a motion for a new trial. This she cannot do, for by remaining silent she waived any objection she might have made to the prejudicial remarks. If this were not so, in all cases when such remarks are made, counsel for the defendant would not object, and in the event of an adverse verdict he then could obtain a new trial by making his first objection to the remarks on motion for a new trial.

[*Waiver*]

In State v. Johnson, 127 La. 458, 53 So. 702, 703, the defendant was charged with the crime of assault with intent to kill. In closing argument to the jury the district attorney said: " 'Gentlemen of the jury, I do not ask you to convict the accused because he is a negro and the prosecutrix a white lady. I ask you to treat him as any other person being tried here, though I think that is a very good reason why he should be convicted.' " In affirming the conviction this court, with Justice Monroe as its organ, said: "It does not appear that the trial judge was asked to take any action in the matter, or that any action was taken, or that any bill was taken to such nonaction * * *. We are of opinion that the remark was uncalled for and should have been omitted. We are also of opinion that counsel for defendant, if he attached serious importance to it, should have requested the trial judge to rule upon his objection and have incorporated the ruling in his bill. State v. Johnson & Butler, 48 La.Ann. [87] 89, 19 So.213; State v. Johnson, 119 La. 130, 43 So. 981. * * *"

That holding in the above cited case is controlling here.

The conviction and sentence are affirmed.

TRIAL PROCEDURE
Juries—California

The PEOPLE of the State of California v. William CARTER.

District Court of Appeal, Third District, California, March 6, 1957, 307 P.2d 670.

SUMMARY: The defendant was convicted in a California state court of assault with a deadly weapon upon a fellow prisoner. He appealed on the ground, among others, that his constitu-

tional rights were violated in that no Negroes were impaneled on the jury which tried him. The California District Court of Appeal found that there was no showing of a deliberate or systematic exclusion of Negroes from the jury and, therefore, no violation of constitutional rights. A portion of the opinion, by PEEK, J., follows:

The defendant appeals from a judgment entered upon the jury's verdict finding him guilty of a violation of section 4501 of the Penal Code. Upon defendant's request, attorney Max H. Hoseit was appointed by this court to represent him on appeal. Mr. Hoseit has now reported to the court that the record discloses substantial evidence to support the verdict of the jury and that he finds no error therein. The defendant, however, not being satisfied with the advice of counsel, has filed with the court a document which he denominates his brief on appeal. By reason of the circumstances, this court has made an independent study of the record. It is our conclusion that there is no merit in defendant's contentions which are essentially that the evidence is insufficient to support the verdict; that the court erred in the admission of certain exhibits into evidence; that he was denied a speedy trial; that the district attorney committed prejudicial misconduct in his argument to the jury; and that his constitutional rights were violated in that no Negroes were impaneled on the jury. Other contentions are made, but since none of the matters concerning which defendant complains appear in the record before us, they cannot be considered on appeal.

* * *

It is the further contention of defendant that he was deprived of a fair and impartial trial because no Negroes were impaneled on the jury. Again, no question in this regard was raised at the time of trial. People v. Shannon, 203 Cal. 139, 263 P. 522. The lack of Negroes on a jury does not violate a defendant's rights in the absence of a showing that qualified Negroes were deliberately and systematically excluded. People v. Hines, 12 Cal.2d 535, 86 P.2d 92; People v. Jackson, 88 Cal.App.2d 747, 199 P.2d 322.

The remaining contentions made by defendant all refer to matters wholly outside of the record on appeal, and hence may not be considered now by this court.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J., pro tem., concur.

TRIAL PROCEDURE
Grand Juries—Indiana

Willie FRAZIER v. J. Ellis OVERLADE, as Warden of the Indiana State Prison.

United States District Court, Northern District, Indiana, January 21, 1957, 147 F.Supp. 546.

SUMMARY: Following his conviction for second degree murder in an Indiana state court the petitioner sought a writ of habeas corpus in federal district court. He stated as grounds for his petition that there had been a systematic exclusion of Negroes from the grand jury which indicted him and from the petit jury which convicted him. The court found no evidence to support this contention and dismissed the petition.

PARKINSON, District Judge.

This is a habeas corpus proceeding wherein writ was issued, return and answer filed by the respondent and tried to the court. It is the cause on the merits which now solicits the decision of this court.

As the findings of fact and conclusions of law will appear in this opinion, it will be filed and will so serve.

The petitioner is in the custody of the respondent under a commitment issued by the Allen Circuit Court of Allen County, Indiana on a judgment of conviction of second degree murder entered on September 30, 1948 on a verdict of the jury.

The petitioner contends that his detention is illegal because the Allen Circuit Court erred in admitting his written confession in evidence;

that Negroes were excluded from grand juries in Allen County, Indiana, and that court appointed counsel, who represented him in the trial of his case, was incompetent.

The undisputed evidence is that the written confession of the petitioner was properly admitted in evidence and the Allen Circuit Court committed no error in that regard nor was any error committed in the entire trial.

The petitioner offered no evidence that Negroes were excluded from juries in Allen County, Indiana. He did testify that there were no Negroes on the petit jury which tried his case but the undisputed evidence is that Negroes are nor were not excluded from jury service in Allen County, Indiana but are included and have served on juries in Allen County, Indiana for many years including the period of time during which the petitioner was indicted and tried.

The undisputed evidence is that Robert E. Myers, a member of the Allen County Bar, was appointed by the Allen Circuit Court to represent the petitioner and did so represent him. This court now holds, from the evidence in the record, that Robert E. Myers is a reputable and competent attorney and that he ably represented the petitioner and did everything for the petitioner in the trial of his case which any attorney could have done under the circumstances to adequately and competently represent him.

This court has carefully considered all of the evidence in the record and, without regard to the fact that the petitioner has failed to show that he has exhausted the remedies available to him in the state courts of Indiana, now concludes and holds that the petitioner has wholly failed to prove by any evidence that his detention is illegal and that he is entitled to any relief.

It is, therefore, the considered judgment of this court that the prayer of the petition be denied; that the petition be dismissed; that the respondent be discharged from the writ, and that the petitioner be remanded to the custody of the respondent.

The clerk will enter judgment accordingly.

TRIAL PROCEDURE
Sentencing—Florida

Jimmie Lee THOMAS v. STATE of Florida

Supreme Court of Florida, February 6, 1957, 92 So.2d 621.

SUMMARY: Thomas, a Negro, was convicted of rape in a Florida state court and, there being no recommendation for mercy, sentenced to death. On appeal to the Florida Supreme Court he alleged, among other errors, that he was denied the constitutional right to a fair and impartial trial because juries in Florida had systematically refused to recommend mercy towards Negro men convicted of rape while so recommending when the defendant was white. The court found that there was no support for this contention, as well as for other alleged errors, and affirmed. A portion of the opinion, by TERRELL, Chief Justice, follows:

Jimmie Lee Thomas was indicted, tried and convicted for rape in Duval County, his conviction having taken place July 21, 1955. The extreme penalty (death by electrocution) was imposed and this appeal was prosecuted from that judgment.

* * *

It is last contended that appellant's constitutional right to fair and impartial trial was impaired by Secs. 919.23 and 794.01, Florida Statutes, F.S.A., providing that the penalty for rape is death unless the majority of the jury recommended mercy.

In the first place, the statute complained of is in appellant's favor and he is not in position to complain. In the second place, the court and not the jury determines the punishment when the jury recommends mercy. Appellant then advances the statistical argument that for the 20-year period, 1935 to 1955, twenty-three Negro defendants were executed for rape and during the same period only one white defendant was executed for that crime. From these figures appellant deduces the conclusion that Negroes have been discriminated against and denied due process. It is settled law that all such cases turn on

the peculiar facts of the case. The facts in none of these cases are given us. In sum, it may be stated that about all these statistics show is that more Negroes have been tried and convicted for rape than white defendants. We covered this aspect of the question in State ex rel. Copeland v. Mayo, Fla., 87 So.2d 501, and State ex rel. Johnson v. Mayo, Fla., 69 So.2d 307.

In our view the evidence was ample to sustain the conviction, there was no lack of due process or equal protection, so the judgment must be and is hereby affirmed.

Affirmed.

ROBERTS, DREW, THORNAL and O'CONNELL, JJ., concur.

THOMAS and HOBSON, JJ., not participating.

FAMILY RELATIONS
Marriage—Tennessee

Edward EVANS v. Amanda YOUNG et al.

Supreme Court of Tennessee, February 8, 1957, 299 S.W.2d 218.

SUMMARY: A suit was brought in a Tennessee state court to determine whether the collateral heirs (i.e., persons related through a common ancestor rather than as direct descendants) of a Negro born of slave parents would inherit real property left by him upon death in preference to persons designated in the will of his then surviving wife. The deceased property owner was born in 1864 in Mississippi to slave parents. At the time of his birth slave "marriages" were not recognized as legal. In 1865 Mississippi enacted a statute which provided that prior unions of slaves would be recognized as valid marriages and that children of such unions would be legitimated. Tennessee enacted a similar statute at about the same time but which has been held to apply only to persons living together as man and wife in Tennessee at the time. The deceased property owner married in Mississippi and then moved to Tennessee, acquiring real property in the latter state. He died in 1937 and his widow exerted control over the property until her death in 1953, at which time she designated persons by will to receive the property. The present suit was brought by persons claiming the property as collateral heirs by relationship through the deceased property owner's parents (i.e., his mother's brothers and sisters). Involved was the construction of a Tennessee statute which had previously been held to extend the right of inheritance to legitimated children of former slave parents only to property of their parents and not to collateral kin. The trial court and Tennessee Court of Appeals held in favor of the collateral heirs. On appeal the Tennessee Supreme Court, one justice dissenting, held that Tennessee would recognize the right of inheritance of collateral heirs found to be conferred by the Mississippi laws and affirmed.

BURNETT, Justice.

The question for determination here is: Do the collateral heirs of a deceased Negro born of slave parents in a foreign State take real estate left by him in preference to the devisees of his wife? The Chancellor and the Court of Appeals held that these collateral heirs did inherit from the child of this slave marriage of a foreign State. The matter has been ably briefed and argued and we now have the question for determination.

Cornelius Walker, a Negro, was born in Mississippi in 1864. At the time of his birth slavery had not been abolished in that State. He was the only child of Jeff and Amanda Walker, who were at all times residents of the State of Mississippi. Jeff Walker had no brothers or sisters. Amanda Walker was born at Statom and had two brothers and two sisters, who claim the property in question.

Jeff and Amanda Walker lived together as man and wife, and held themselves out as such and were known in the community in which they lived prior to and at the birth of Cornelius Walker, as husband and wife. They so held themselves out until the death of Jeff Walker

in 1885 in Mississippi. The mother remarried and died in 1927.

Cornelius Walker married Millie Bush in Mississippi and later moved to Tennessee where they lived for a great number of years prior to Cornelius' death in 1937, when he was a resident of Shelby County, Tennessee. His wife Millie continued to live in Memphis, Tennessee until her death in 1953. Neither Cornelius nor Millie had any children. At the time of the death of Cornelius he held title to several pieces of real estate described in the pleadings and it is the title to these parcels of real estate which is the dispute of this law suit. After Cornelius' death Millie continued to collect the rentals from the property until her death. Millie left a will which is not attacked in this lawsuit in which she willed the property to those of her choosing. The original bill was filed to clear up the situation and was filed on the theory that Cornelius Walker, being a Negro born in a slave State before slavery was abolished, was illegitimate, and under the laws of this State that the inheritance from him was governed by our statutes controlling illegitimates, Section 31-105, T.C.A. There is no attack made on the legitimacy of the collateral kin of Cornelius.

[*Legitimating Statute*]

The record contains certified copies of Chapter 4, of the Public Acts of Mississippi of 1865, and of Section 22, Article 12, of the Constitution of Mississippi, 1869. Under these Mississippi laws it is plain that Cornelius Walker was legitimated as the child of Jeff and Amanda Walker. Section 8, of the Mississippi Act is:

> "Be it further enacted, That all freedmen, free negroes and mulattoes, who do now and have heretofore lived and cohabited together as husband and wife shall be taken and held in law as legally married, and the issue shall be taken and held as legitimate for all purposes."

By referring to the portion of the Constitution of Mississippi, at the time, it is shown that whether these children were born before or after the Constitution was ratified that they were legitimated. Thus under the Mississippi law Cornelius was legitimated in that State and that was his status when he moved to Tennessee. In Finley v. Brown, 122 Tenn. 316, 123 S.W. 359, 362, 25 L.R.A., N.S., 1285, this Court declared the applicable law here to be applied as follows:

> "There is no doubt whatever, under the authorities in this country, that a child who, in a foreign state in which both it and the adoptive father are domiciled, has acquired under the laws of that state the status of child by adoption, must, under the comity of states, receive recognition of its status as child in every other state having substantially similar adoption laws, and must be held capable of succeeding to real property in accordance with the laws of the state where the property lies, if adopted children are capable of inheriting under the local law of the latter state. * * *
>
> "Inheritance is governed by the lex rei sitae; but legitimacy is to be ascertained by the lex domicilii."

[*Tennessee Law*]

As was said above the statutes and Constitution of Mississippi legitimized Cornelius Walker. We have a similar statute in this State which was enacted for the purpose of legitimizing the children of slave marriages of those slaves who lived in this State, Section 31-302, T.C.A. The purpose of such statutes is to validate these slave marriages and to render their children capable of inheriting. Carver v. Maxwell, 110 Tenn. 75, 71 S.W. 752. This Court held in that case that such statutes should be liberally construed in order to carry out the beneficent public policy of the State, but those people claiming the benefit of such statutes must bring themselves within the terms of the statute. We have further held in reference to the children of these slave marriages that the laws of the jurisdiction where the children were legitimized follows the person and should be sustained wherever he may go although it is necessary that he yield to the public policy of the State of his adoption as far as inheritance is concerned. Cole v. Taylor, 132 Tenn. 92, 177 S.W. 61. (This is a collateral inheritance case). In the same volume is the case of Napier v. Church, 132 Tenn. 111, 177 S.W. 56, which is a lineal descendant heirs case. In that case this Court held that for us to recognize the legitimacy of the issue of the slave marriage of the foreign State then the law of that State must be clear and convincing. The Court then went on to (neither the father nor the mother were residents of the State of Tennessee nor the heir claiming nor had they ever lived together as husband and wife in this State), hold that the

laws of Louisiana attempting to legitimize this slave marriage were very uncertain and were not clear and convincing. Thus it was that in Napier v. Church, supra, this Court refused to recognize the lineal descendant of Church under a purported slave marriage of Louisiana.

[*Prior Case*]

The question before the Court in Cole v. Taylor, supra, [132 Tenn. 92, 177 S.W. 63] was whether or not, "on the grounds of comity between the states" the laws of Georgia and Alabama or Mississippi granted "to ex-slaves coming from one or the other of these states a right of collateral inheritance which the Legislature of our own state has refused to persons born of slave marriages in the state of Tennessee". The Court herein said that this State had settled the question under our Act hereinbefore referred to, Sec. 31-302, T.C.A., that we only recognized the children of slave marriages of this State of direct inheritance from the parents. In doing so this Court in Cole v. Taylor, supra, quoted again and with approval from Shepherd v. Carlin, 99 Tenn. 64, 41 S.W. 340, as follows:

> "'We are of opinion that, by the plain terms of this act, the right and power of inheritance is conferred only as to such property as may descend from parents, and that no right of collateral inheritance is conferred by the act. This was no doubt the intention of the General Assembly, and is the clear meaning of the words of the act, which can admit of no other construction.'"

This Court therein, that is, in Cole v. Taylor, went on then to say that:

> "Tennessee has seen proper not to grant the right of collateral inheritance to such people, had their parents lived together as husband and wife in this state. It cannot be expected that the courts out of mere comity shall grant to citizens coming from other states a right which this state does not grant its own citizens."

And further that:

> "Their subsequent legitimation, wherever it may have occurred, must yield to the statute of Tennessee limiting the right of such persons to inherit only from the parent. To hold otherwise would discriminate in favor of nonresidents coming to this state, as against the policy of our own law, and to confer a right upon them not common to natives of the state."

Thus we see what the holding of Cole v. Taylor is. This is a case which is principally relied upon by the petitioner herein.

Cole v. Taylor, supra, was handed down in 1915, as was Napier v. Church, supra. Two years later the Court of Civil Appeals in Davidson v. Jennings, 8 Tenn.Civ.App. 355, again held that the right of inheritance did not extend beyond the lineal descendants of parents. This Civil Appeals case was in 1917. The Legislature of 1919, by Chapter 14 of the Public Acts of that year, passed an Act in which it was enacted,

> "That the collateral kindred of a deceased negro shall inherit his or her real and personal property in the same manner and to the same extent that the collateral kindred of a deceased white person inherits his or her real and personal property under existing laws."

[*1929 Act*]

By the Public Acts of 1929, Chapter 133, the Legislature added to the 1914 Act. This amendment though did not affect in any way the provision above quoted and only provided that such property would go to these collaterals if it had not escheated to the State or that no other substantial right had intervened. This Act is carried in the Code at the present time as Section 31-303, T.C.A. and is in the Chapter of the Code under Descent and Distribution. The heading of the chapter is "Persons Of Color," and § 31-303 reads as follows:

> "The collateral kindred of a deceased person of color shall inherit his estate, real and personal, as in case of the collateral kindred of a white person, and regardless of the date of the death of such person of color, provided, that the property has not passed to the state by escheat enforced, and, further, that no substantial right of another person in the property has intervened."

It is the very earnest contention of the respondents that this Act of 1919 as amended by 1929 and now codified, extended the right of inheritance to collaterals of a deceased Negro and that since it contains no reference whatso-

ever to the place of birth of deceased Negroes that the rule of comity is applicable under the rationale of the opinion of Cole v. Taylor, supra, and that this being true the Court must and should recognize that Cornelius Walker is a legitimate for the purpose of recognition of the respondents as his heirs at law. The Chancellor and the Court of Appeals sustained this contention.

[*Public Policy*]

This Court in Carver v. Maxwell, supra, held that such an act should be liberally construed in order to carry out the beneficent public policy of the State that such an act does state the policy of the State. The statute, that is, 1919, 1929 Acts as codified, extends the right of collateral inheritance to the kindred of any deceased person of color or Negro just as under the laws such a right is given to white persons provided that such people, that is, collaterals, are of legitimate descent. In this case there is no question made as to the collaterals of Cornelius Walker being of legitimate descent. Thus it seems to us that the statute is so comprehensive that it includes all Negroes of legitimate birth who are collateral kindred of this deceased Negro. The laws of Mississippi made Cornelius Walker legitimate.

[*Collateral Heirs of Tennessee Marriage*]

The Court of Appeals in Wallace v. Berry, 6 Tenn.App. 248, held that this 1919 Act, as amended and codified did extend to collateral heirs of the issue of slave marriages of this State. Certiorari was denied by this Court in that case. That same Court speaking through the same Judge in Rhea v. Redus, 7 Tenn.App. 478 (no certiorari applied for) held that this same Act, 1919 Act as amended, etc., did not apply because of the nonresidence of the slave parents at the time of the birth. It might be well to say that neither the Act nor the question was before the court and that was purely a gratuitous statement on the part of the Court. The statements made by the same Court in Wallace v. Berry, supra, are not applicable here because Cornelius Walker's parents were born outside of the State.

That Court in Wallace v. Berry, supra, made certain statements though which were applicable to that case which we think for reasons heretofore and hereinafter expressed are likewise applicable to the facts of the instant case. We therefore adopt certain language used in that case as a correct rule to apply to this case. That Court said:

> "The Act of 1919 does not limit the right of collateral inheritance to persons who are not the issue of slave marriages. It extends this right to the kindred of any deceased negro just as under our laws it is given to the kindred of white persons, provided such kindred are of legitimate descent. Negroes not born in slavery nor the issue of slave marriages have had the same rights of inheritance as white persons ever since they became citizens. The Act of 1919 is so comprehensive that it includes all negroes of legitimate birth who are collateral kindred of a deceased negro * * *. The Act of 1919 was clearly intended to create an additional right of inheritance conformable to the now prevailing usage of this State, out of a larger consideration of the status of the negro in our citizenship."

[*Legitimation By Foreign Marriage*]

The rationale of the question here determined was, we think, determined by this Court in an able opinion prepared for the Court by the present Chief Justice in the case of Smith v. Mitchell, 185 Tenn. 57, 202 S.W.2d 979, 983. In that case we held that where the putative father of an illegitimate and mother of such child are married in a foreign State or that if there is an adoption of a child in a foreign State and under the statute of that State the child is legitimated, that thereafter such child inherits from the putative father or adopting parent according to the laws of descent in Tennessee as if they had been born legitimate in Tennessee. Under the facts of that case the putative father and mother had adult bastard children and went over into the State of Alabama and were there married. This Court properly held that since under the laws of Alabama these children were legitimated that then these legitimated children would inherit under our laws. A bastard under the laws of this State who is legitimized by the laws of another State is recognized and treated as legitimate so far as inheriting property in this State. Why should we make any difference in the issue of slave marriages who are legitimated by the foreign State and another?

[*Laws Similar*]

When we compare the statutory and constitutional law of the State of Mississippi with that of Tennessee in legitimizing Cornelius Walker we find that these laws are very similar. It seems to us that under the authority of Smith v. Mitchell, supra, that therein we are expressing and have expressed the present public policy of this State to a great extent. This policy of course should be, and is, where possible, to try to make a person legitimate rather than illegitimate. There is no reason to make any distinction between the legitimation of Cornelius Walker by the laws of Mississippi and in making the children in Smith v. Mitchell, legitimate which were made legitimate by their parents being married under the laws of Alabama. There is no distinction in principle that can be made.

In Smith v. Mitchell, supra, this Court again recognized and properly so the statement heretofore quoted from Finley v. Brown, supra. This Court said in Smith v. Mitchell, supra, that:

> "In other words, if the child is capable of inheriting in the foreign state, he, being legitimated by marriage of the parents and by force of law, is thereby legitimated in Tennessee, and is capable of inheriting lands lying in this state. But the rights acquired under foreign adoption or legitimation will not be enlarged so as to confer rights of inheritance in this state contrary to our own statute of descent."

And, we further said in that case that:

> "We think they are substantially similar when they effectuate the same result, that is, giving an illegitimate the status of a legitimate child. But the right of a child legitimated in a foreign state to inherit lands in Tennessee is exactly the same as a child legitimated by statutory proceeding in Tennessee, thus giving the laws of a foreign state no extraterritorial force."

And:

> "As to the devolution of property of the adopting or legitimating parent, we adhere to the majority rule that the status of the child will follow him to, and be recognized in, the state where the property is situated, entitling him to inherit it if, and to the extent, that the law of this state allows such child to inherit."

[*Mississippi Legitimation Recognized*]

Thus we must conclude that by the Acts of the General Assembly of 1919 as amended and codified, heretofore cited, and under the authority of Smith v. Mitchell, supra, that the public policy of this State now is to recognize as legitimate Cornelius Walker. Therefore the result is that his collateral heirs are entitled to inherit as the collaterals of any other Negro in this State or white person as far as that is concerned. Having reached this conclusion the judgment of the Chancellor and the Court of Appeals must be affirmed.

[*Concurring Opinion*]

TOMLINSON, Justice (concurring).

For immediate clarity I quote the pertinent 1919 statute:

> "The collateral kindred of a deceased person of color shall inherit his estate, real and personal, as in the case of the collateral kindred of a white person." T.C.A. § 31-303.

The language just quoted is entirely free of doubt or imbiguity. It is, in my judgment, susceptible to but one interpretation,—to-wit, that the collateral kindred of Cornelius Walker, who was a legitimate issue of a slave marriage, inherited his estate, he having died intestate, a resident of Tennessee.

This collateral kin may not be deprived of the inheritance which is theirs under the provisions of this plain, unambiguous statute without reading into that statute under the rules of judicial construction the provision that it, the statute shall not apply if the slave parents of the deceased did not live in Tennessee.

[*Construction of 1865 Act*]

It is argued in behalf of the widow of Walker that the Court should so construe this 1919 statute as to add the supposed exception above stated. This insistence is based on the fact that a statute enacted in 1865 referred to in the majority opinion did not permit the issue of a slave marriage to inherit unless the parents of such issue lived in this State.

The rule with reference to the construction of a statute in the light of this 1919 statute prohibits the Court from reading into it such an exception, in my opinion. That rule is stated in Atlantic

Coast Line Railroad Co. v. Richardson, 121 Tenn. 448, 459-460, 117 S.W. 496, 499, as follows:

> "There is no doubt, in construing statutes, that it is the duty of the courts to give effect to the intent of the lawmaking power, and to seek for that intent in every legitimate way; but it is well settled that this intention must be sought primarily in the language of the act itself, as the presumption is that the Legislature has selected apt words for the expression of its will. The necessary effect of this is; where it is found upon examination that the language of the act is free from doubt or ambiguity, and expresses an intelligent and definite meaning, the courts are bound to assume that this meaning is that which the Legislature had in mind. To such an extent has this rule been recognized that, though the court is satisfied some other or different meaning was behind the legislation, and though a literal interpretation might defeat what was well understood to be the purpose of its enactment, 'still the explicit declaration of the Legislature is the law, and the courts are not at liberty to depart from it.' It is only where the statute is ambiguous, or lacks precision, or is fairly susceptible to two or more interpretations, the intended meaning of the act 'must be sought by the aid of all pertinent and admissible considerations.'"

[*Legislative History*]

But if I were inclined to take up the risky business of judicially saying by way of construction that the Legislature meant less or more than it unequivocally and in simple language said, I would be deterred by the legislative history of the State on the subject in question between the enactment of 1865 and the 1919 statutes respectively.

Twenty-two years after the enactment of this 1865 statute, the Legislature undertook to broaden it by providing that there should fall within it children of slave marriages "who have been living as man and wife in other States, and who have moved to this State," and that it "be applied to such persons and their issue, whether born in this State or elsewhere." Pub.Acts 1887, c. 151. The Act was held to violate the caption clause of the Constitution. It is important, however, in that it discloses a desire upon the part of the Legislature to make more liberal the inheritance laws wherein are involved slave marriages. Wilson v. Wilson, 137 Tenn. 590, 593-594, 195 S.W. 173.

Pursuant to, I should say, ordinary dictates of justice, this Court took note of this class of people in Carver v. Maxwell, 110 Tenn. 75, 81, 71 S.W. 752, 753, to the extent of observing that a statute of that kind is "remedial in its nature, and should be liberally construed."

In 1917 the Court of Civil Appeals in Davidson v. Jennings, 8 Tenn.Civ.App. 355, reaffirmed previous holding that "there is no inheritability among the collateral kin of those born in slavery."

To me the significance of Davidson v. Jennings decided in 1917 is that at the very next term of the Legislature, 1919, there was enacted Section 31-303, T.C.A. quoted at the beginning of this opinion.

It is reasonable to conclude that this 1919 statute was enacted as a direct result of the 1917 decision. Indeed it seems to me a little unrealistic to conclude otherwise, particularly in view of the fact that the Legislature had for years indicated a more liberalizing intention as to making inheritance from the issue of slave marriages more nearly on an equal with inheritance from the legitimate issue of white parents.

I would think, therefore, that we are justified in concluding that the 1919 statute intended to provide just what it says, to-wit, that the collateral kindred of a deceased person of color shall inherit the estate of the intestate deceased to the same extent as the collateral kindred of white people.

As I view it, the plain language of the 1919 statute as well as the legislative history preceding its enactment, if such history is to be considered, requires a holding by this Court that the collateral kin of Walker inherit his estate.

[*Dissent*]

SWEPSTON, Justice (dissenting).

I respectfully dissent from the majority opinion for the following reasons. In the final analysis the real question is the proper construction of Chapter 14 of the Acts of 1919, which provided as follows:

> "The collateral kindred of a deceased person of color shall inherit his estate, real and personal, as in the case of the collateral kindred of a white person."

This Act was amended by Chapter 133 of the Public Acts of 1929, as the same now appears in T.C.A. § 31-303, but said amendment is not material in this discussion.

[*Majority Opinion Unreasonable*]

The majority opinion construes this Act according to the letter thereof, in complete disregard of the legislative history and judicial decisions expressing public policy in regard to the right of the direct descendants of slave marriages and of the collateral kin to inherit, thereby producing a result which seems to me to be quite bizarre and without any foundation of reason. I shall seek to demonstrate the point after calling attention to the statement in the case of Memphis St. Railroad Co. v. Byrne, 119 Tenn. 278, 322, 104 S.W. 460, 471, which is as follows:

> "Ambiguity in a statute may arise either from confusion or indefiniteness in the language used, or the consequences of strict adherence to the literalism of that language. In Lewis' Sutherland on Statutory Construction, § 377, it is said: 'Uncertainty of sense does not alone spring from uncertainty of expression. It is always presumed, in regard to a statute, that no absurd or unreasonable result was intended by the Legislature. Hence if, viewing a statute from the standpoint of the literal sense of its language, it is unreasonable or absurd, and obscurity of meaning exists, calling for judicial construction, we must in that event look to the act as a whole, to the subject with which it deals, to the reason and spirit of the enactment, and thereby, if possible, discover its real purposes; and, if such purposes can reasonably be said to be within the scope of the language used, it must be taken to be a part of the law, the same as if it were plainly expressed by the literal sense of the words used. In that way, while courts do not and cannot properly bend words out of their reasonable meaning to effect a legislative purpose, they do give to words a literal or strict interpretation within the bounds of reason, sacrificing literal sense and rejecting interpretation not in harmony with the evident intent of the lawmakers, rather than that such intent shall fail.'"

As illustrative of disregarding literal language of an Act to arrive at the intent of the Legislature, see Tennessee Title Co. v. First Fed. Savs. & Loan Ass'n, 185 Tenn. 145, 203 S.W.2d 697.

As stated in the majority opinion the contest is between the collateral heirs of Cornelius Walker, a Negro, and a devisee, Edward Evans, of his widow Millie Bush Walker; the marriage of Cornelius Walker's parents was validated by the laws of Mississippi, where they always lived and Cornelius Walker himself was legitimated by said laws. There is no question about the legitimacy of the collateral heirs of Cornelius Walker.

[*History of Laws*]

Now the history of the laws of Tennessee by which the right of inheritance was conferred upon the direct issue of slave marriages and of collateral kin is as follows: The Acts of 1865-1866, Chapter 40, section 5, as the same now appears in T.C.A. § 31-302 provided as follows:

> "All persons of color who are *living together as husband and wife in this state,* prior to 1865, are declared to be man and wife, and their children legitimately entitled to an inheritance in any property of said parents, to as full an extent as the children of white citizens." (Emphasis ours.)

In several cases it was successively held that this statute applied (1) only to those persons who were living together as husband and wife *in this State,* (2) to the lineal descendants of such parents, and (3) no right of collateral inheritance is conferred by the Act.

Chapter 151, Acts 1887, held unconstitutional in Wilson v. Wilson, 137 Tenn. 590, 195 S.W. 173, was an attempt to include such persons as had moved to Tennessee.

[*Residence of Parents*]

In the case of Cole v. Taylor, 1915, 132 Tenn. 92, 177 S.W. 61, the facts were exactly analogous to the facts of the instant case except that the claimant of the real estate was Alice Cole who was a sister of her deceased brother, Tom Pollard, and these two were children of slave parents who were married according to the custom of slave marriages in Georgia but who had never lived in Tennessee. These two children had been legitimated under the laws of a foreign State before they came into Tennessee.

The Court construed the statute as above stated and further said that while these two

children of slave parents had been legitimated in a foreign State, yet that relationship must yield to the policy of our own law in its control of the descent of real property within its borders and that Tennessee has seen proper not to grant the right of collateral inheritance to such people, unless their parents lived together as husband and wife in this State; it cannot be expected that the Courts out of mere comity shall grant to citizens coming from other states a right which this State does not grant to its own citizens, that is the right of collateral inheritance.

Then in Napier v. Church, 1915; 132 Tenn. 111, 177 S.W. 56, there was involved the right of a direct descendant to inherit where the parents had never lived in the State of Tennessee. In that case the Court held not only as stated in the instant majority opinion that the law of Louisiana was not clear and convincing with reference to establishing the legitimacy of the issue of slave marriage and, therefore, the Tennessee Court would not hold that the issue had been legitimated, but the opinion went further and held that no part of said Act of 1865-1866, Chapter 40, supra, was applicable to the facts of that case; so the necessary conclusion is that even if legitimacy in Louisiana had been established, still there would be no right of inheritance by a direct descendant because the parents *had never lived together in the State of Tennessee.*

Then, as stated in the majority opinion, the Court of Civil Appeals in Davidson v. Jennings, 1917, 8 Tenn.Civ.App. 355, reiterated the holding that the right of inheritance did not extend beyond the lineal descendants of parents who had lived together as husband and wife in Tennessee.

It was in the light of this history as expressed in the foregoing and in numerous other cases holding that even in the case of such persons living together as husband and wife *in this State* there was no inheritance among collaterals, that Chapter 14, Acts of 1919 was enacted.

The only case in which this latter Act has been construed is the case of Wallace v. Berry, 1927, 6 Tenn.App. 248. There, the Court stated the question for decision as follows:

> "Does the Act of 1919, Chapter 14, extend the right of collateral inheritance to the issue of slave marriages?"

Now keeping in mind that the Court was dealing with a slave marriage where the parties had *resided in Tennessee,* the Court used the following language:

> "It is insisted that this Act is merely declaratory of the law already in force at the time of the passage of the Act; that it creates no new rule of inheritance. It is true that it does not affect the rule that an illegitimate person is incapable of inheriting, except from the mother. But we are of opinion that this conferred the right of inheritance upon persons of legitimate descent who are collateral kindred of deceased negroes; that if persons of color are descendants of free persons of color who were living together as husband and wife *in this state* while in the state of slavery, and declared by section 5, Chapter 40 of the Acts of 1865-66 (Shann.Code, sections 4179 and 4198) to be man and wife they are entitled to inherit the property of their collateral relatives dying intestate to whom they are next of kin.
>
> "The Act of 1919 does not limit the right of collateral inheritance to persons who are not the same issue of slave marriages. It extends this right to the kindred of any deceased negro just as under our laws it is given to the kindred of white persons, provided such kindred are of legitimate descent. Negroes not born in slavery nor the issue of slave marriages have had the same rights of inheritance as white persons ever since they became citizens. The Act of 1919 is so comprehensive that it includes all those of legitimate birth who are collateral kindred of a deceased negro. To hold otherwise would be to fail to give a literal interpretation to the Act. It was manifestly intended as an enlargement, by amendment, of the provisions of the said section 5 of Chapter 40 of the Acts of 1865-66, which is as follows:" (See Act quoted hereinabove.)

Now, reference to the majority opinion will disclose that it omits the first paragraph which is quoted immediately hereinabove and which contains the specific decision of the Court on the factual situation involved, and only quotes a part of the second paragraph which is general and omits the last sentence of same, which is a specific statement that can only mean that the Act of 1865-66 was enlarged by the Act of 1919

to include collateral kin of slave marriages where the couple have resided in Tennessee.

The following year Judge DeWitt, who wrote the opinion in the Wallace v. Berry cause, had before him a later case of Rhea v. Redus, 1928, 7 Tenn.App. 478, in which he made no reference to the Act of 1919, and in which he denied the right of inheritance to the issue of a slave marriage in another State in the following language:

> "In as much as Malinda Vaughan was the issue of a slave marriage in another State, her parent could not inherit from her under section 4178-a1 of Shannon's Ann.Code, for the reason that this section does not apply to slaves living in other States, being restricted to slaves who had been living together within this State as husband and wife. Napier v. Church, 132 Tenn. 111, 177 S.W. 56; Cole v. Taylor, 132 Tenn. 92, 177 S.W. 61."

While no petition for certiorari was filed in that case, certainly Judge Faw, Judge DeWitt and Judge Crownover did not overlook the Act of 1919, which they had dealt with just one year before, supra; that is very significant.

[*State Policy Unchanged*]

Neither the Act of 1919, nor any other Act up to the date of the death of Cornelius Walker contains the slightest suggestion of any intention to change the long-established policy of Tennessee so as to give the right of inheritance to direct descendants of slave marriages of other States *which couples had not resided together as husband and wife in Tennessee.* It is, therefore, difficult to understand why such right of inheritance would be conferred on the collateral kin of such direct descendants who themselves had no inheritable blood. In fact, to so hold seems to me to produce an unreasonable and absurd result that was not intended by the Legislature, as disclosed by the foregoing legislative Acts and judicial opinions.

The majority opinion cites Smith v. Mitchell, 185 Tenn. 57, 202 S.W.2d 979, which I agree is a very able opinion by Chief Justice Neil and that the case was correctly decided, but in the final analysis it is simply an application of the principles stated in Finley v. Brown, 122 Tenn. 316, 123 S.W. 359, 25 L.R.A.,N.S., 1285, which is cited the opinion of Chief Justice Neil, to the effect that inheritance is governed by the lex rei sitae; but legitimacy is to be ascertained by lex domicilii.

However, the opinion uses these very significant expressions. On page 65 of 185 Tenn., on page 982 of 202 S.W.2d it is said:

> "The effect of our holding in Finley v. Brown, supra, (122 Tenn. 316, 123 S.W. 363) is that children who are legitimate in one state are legitimate everywhere, with this important qualification, 'States acting by comity will not permit a statute of a foreign state to extend any further than a local statute upon the same subject, or to confer any other rights; thus pursuing the principle that the lex loci rei sitae must control in the disposition of real estate.'"

Then on page 66 of 185 Tenn., on page 983 of 202 S.W.2d it is said:

> "We think the effect of the Court's decision in these cases is that if a child is adopted or legitimated in a foreign state it can inherit from the parent in Tennessee provided the law of the foreign state is not inconsistent with, or opposed to, the policy of our own state. In other words, if a child is capable of inheriting in the foreign state, he, being legitimated by marriage of the parents and by force of law, is thereby legitimated in Tennessee, and is capable of inheriting lands lying in this state. But the rights acquired under foreign adoption or legitimation will not be enlarged so as to confer rights of inheritance in this state contrary to our own statute of descent."

This is reiterated on page 68, first paragraph, of 185 Tenn., on page 984 of 202 S.W.2d where it is said:

> "They could only inherit, however, as provided by the statutes of descent in this state."

Now the majority opinion, at page 222 of 299 S.W.2d says:

> "A bastard under the laws of this State who is legitimatized by the laws of another State is recognized and treated as legitimate so far as inheriting property in this State. Why should we make any difference in the issue of slave marriages who are legitimated by the foreign State and another?"

The answer to that question simply is that there is no dispute that Cornelius Walker, having

been legitimated under the laws of Mississippi, is legitimated under the laws of Tennessee and naturally, if the law in Tennessee permitted it, he would have been entitled to inherit and, likewise, so would the collateral, if legitimated, of Cornelius Walker or his parents. But the fact is there was not in existence during the life of Cornelius any statute in this State which permitted direct descendants of slave couples who had never lived together as husband and wife in this State, even though their marriage was legitimated under the laws of the State of their residence.

[*Result Absurd*]

Hence, the result of the construction placed upon the Act of 1919 by the majority opinion is to confer a right of inheritance upon collateral descendants of such foreign slave couples who have never resided in Tennessee, while the same privilege is denied to the direct descendants. Such a view is contrary to the laws of inheritance of this and every other State and to the laws of nature and is, therefore, an absurd result never intended by our Legislature.

Moreover, the statement of the majority opinion on page 222 of 299 S.W.2d, supra, if carried to its logical conclusion, would mean that this Court has now changed the law so as to permit direct descendants of such persons to inherit. If so, that is Simon pure legislation by the Court effecting a repeal of the Act of 1865-66.

Accordingly, I am of opinion that Cornelius Walker left no heirs capable of inheriting his real estate and, therefore, the same was inherited by his widow under T.C.A. § 31-103, and that Edward Evans as her devisee is entitled to the property.

FAMILY RELATIONS
Marriage License—Massachusetts

Clarinda Souza ROSE et al. v. Charles W. DEASY, City Clerk of the City of New Bedford.

Superior Court, Suffolk County, Massachusetts, March 12, 1957, No. 71770.

SUMMARY: The petitioner, a daughter of a native of the island of Brava in the Cape Verde Islands, brought an action in a Massachusetts state court to require a city clerk to change the racial designation of the petitioner and her husband on an application for a marriage license from "colored" to "white." The court found that the racial designation had been made apparently because of a local belief that natives of the island of Brava in the Cape Verde Islands are of "mixed blood." The court, after receiving testimony and observing the petitioner, directed that the designation of the petitioner be changed to "white."

MORTON, J.

REPORT OF MATERIAL FACTS and ORDER FOR DECREE

I submit herewith a report of all the material facts upon which my order for decree is based.

This is a bill for declaratory relief, in that the petitioner desires to have herself declared a white person. I expressed my doubt as to whether Chapter 230A applied to this situation, but certainly there is a real controversy between the parties, and counsel for the defendant announced that they would like to have it decided to establish a system or standard for dealing with these cases. In view thereof, I decided to take it as a petition for declaratory judgment.

The petitioner is a widow, daughter of Souza Rose alias Antonio Faria DeSouza. He evidently was born on the Island of Brava in the Cape Verde Islands. In March 17, 1900 he received a passport from the Governor of the Islands in which he is described as white. He received another passport April 8, 1907, when no answers were given to a list of questions such as age, place of birth, color, etc., but a line was drawn right down through the blank spaces.

One Joseph Julio de Rose, the husband and

father, respectively, of the petitioners, is described as white in a passport issued by the Vice-Consul of Portugal in Providence, Rhode Island, dated October 23, 1925. The petitioners, by the way, are the one above referred to and her five children.

[*Birth Certificate*]

The petitioner testified, and I find as a fact, that the petitioner's parents and paternal and maternal grandparents were all white. The petitioner was born in New Bedford on October 22, 1907, and in a birth certificate issued by the City Clerk of New Bedford, a copy of which is annexed to the petition and marked "a", she is described as being white. The sister of the petitioner, one Aurora Souza, was born in New Bedford September 22, 1909, and in a certificate of birth issued by the Secretary of the Commonwealth on August 14, 1956, she was described as being white.

The petitioner and her sister were taken back to the Cape Verde Islands shortly after the birth of Aurora Souza. The Governor of the Islands issued a passport to the petitioner, dated May 11, 1927, by virtue of which she was permitted to return to New Bedford, and in the passport she was described as being white.

The petitioner's father died on April 28, 1946 and a copy of his death certificate is annexed to the petition and marked "C", wherein he is described as being white.

On September 14, 1931, the petitioner Clarinda and her late husband applied at the office of the City Clerk of New Bedford for a marriage license. At the time, neither one of them could read or write English. An assistant clerk drew up the intention to marry. In this application the assistant clerk wrote, for the color of the groom, "dark", and for the color of the bride, "white". On the top of the application, in pencil, written by a predecessor in office of the present City Clerk, are the words "Hold this license I'll have a look at em" (sic). There is no evidence as to whether he looked at them or not, but I find that a change was made in the application by crossing out the word "dark" as to color of the groom and substituting the word "colored" and for the bride crossing out three letters which, so far as I can determine, are "dar" and after that the word "white" and substituting therefor the word "colored". The applicants at the time did not know they were certified in the application as colored; the husband never knew, and the wife, one of the petitioners, didn't learn of it until one of her sons told her that she was so registered and certified.

[*Local Sentiment*]

There was no specific evidence before me upon the matter which immediately follows, but, from the evidence and arguments of counsel, I infer that there is an undercurrent of feeling, certainly in New Bedford and vicinity, that all Bravas—that is, people who come from the Island of Brava—are of mixed blood. So much for the record, except that the petitioners, children of petitioner Clarinda, are all recorded at the State House as white.

I saw the petitioner Clarinda as she testified before me and I find she has none of the characteristics of a colored person and I find and declare she is a white person.

In consequence of the changes made in the notice of intention of marriage as above set forth, the certificate of marriage referred to both the groom and the bride as colored. On the so-called Delayed Return of a Birth referring to Clarinda Souza, opposite color for the father and the mother appears the letter "B". Whether that stands for black or Brava was not set forth before me. Antonio Souza signed the affidavit but he did not sign the return, which is offered before me in the form of a photostat. Said Antonio could not read or write English.

In view of the foregoing, a judgment or decree may be entered declaring that the petitioners are white and commanding the City Clerk of New Bedford, the respondent, or his successor in office, to correct the original application for marriage and the marriage license executed by the petitioner Clarinda and her late husband so that said documents will state that their color is white, and that the word "colored" be stricken therefrom and the word "white" be substituted therefor, and without costs.

FAMILY RELATIONS
Death Certificate—Louisiana

The State of LOUISIANA ex rel. Estelle RODI, wife of Theophile Soulet v. the CITY OF NEW ORLEANS et al.

Court of Appeal of Louisiana, Orleans, February 18, 1957, 94 So.2d 108.

SUMMARY: A woman brought an action in a Louisiana state court to require officials of the city of New Orleans to change the designation of race on her father's death certificate from "Negro" to "white." The death certificate had been registered as "white" but thereafter city officials had, upon the receipt of additional evidence, changed the designation to "Negro." The trial court denied relief. The plaintiff appealed to the Louisiana Court of Appeal on grounds that a statute authorizing such a change was unconstitutional as violative of the Due Process and Equal Protection Clauses of the Constitution and as an unauthorized delegation of authority. It was also alleged that the facts did not support the changed designation. The Court of Appeal affirmed, holding that the statute was not unconstitutional and that the facts of the case supported the action taken by the city officials.

JANVIER, J.

This is the second attempt by Mrs. Estelle Rodi Soulet, widow of Theophile Soulet, to compel the City of New Orleans through its Bureau of Vital Statistics to change its registration of the death of her father, Steve Rodi, (sometimes referred to in this transcript as Steve Jr. and sometimes as Steve II) who died in New Orleans on February 19, 1953, so as to have that record show that her said father was a white man and not a Negro.

The result of the first attempt of relatrix to force this change may be ascertained by reading our decision in that matter. See State ex rel. Rodi v. City of New Orleans, La.App., 78 So.2d 855.

[*Facts*]

When Steve Rodi, Jr., the father of relatrix died, a death certificate was issued by the attending physician. In this certificate the race of Steve Rodi, Jr., was set forth as white. The undertaker who buried Rodi says that he does not perform such services for Negroes. The officials of the cemetery in which the body was interred do not knowingly accept for interment bodies of Negroes. When the registration of Rodi's death was made in the records of the Bureau of Vital Statistics in the City of New Orleans, the information given came from Patrick Denease, a member of the Rodi family, and, according to his information, the said Rodi was white. Accordingly, the death was registered as the death of a white man.

Several months later when some member of the Rodi family desired a copy of that death certificate, the officials in charge of the Bureau of Vital Statistics being familiar with the name Rodi, obtained evidence which convinced them that Rodi was in fact a Negro and not white and, acting on that evidence, which they thought conclusive, those officials changed the registration of the death of Rodi so as to show his race as colored. It was then that the relatrix brought her first mandamus proceeding to compel the City to delete this change in the registration of the race of her father and to restore the original entry so as to show his race as white. In that first proceeding the relatrix did not allege that her father had been a white man. She based her suit solely on the contention that the Bureau, having once made such an entry in its records, could not change that entry except after a judgment of a competent court ordering the change.

[*Exception Filed*]

To that first petition the City filed an exception of no cause of action maintaining that unless the relatrix would allege that her father had actually been white, she could not force the City to change its records so as to show his race as white. The contention of the relatrix in that first proceeding, that the City did not have the legal right to make the change which it had made, was based on the fact that in an earlier case, Sunseri v. Cassagne, 195 La. 19, 196 So. 7, 8, the Supreme Court of Louisiana had said that such officials could not change entries once

made, except upon judgment of a competent court. The Court said:

> "* * * The officer did not have the right to change or alter the certificates even though the information upon which he relied was correct. * * *"

At that time the applicable statute was Act 257 of 1918 which provides that:

> "no certificate of birth or death, after its acceptance for registration by the Local Registrar, and no other record made in pursuance of this Act, shall be altered or changed in any respect otherwise than by judgment of court of competent jurisdiction."

As we showed in our decision in that first proceeding, counsel for relatrix did not then know that after the decision in the Sunseri case the Legislature, in 1942, had enacted Act 181 which, in section 1, provides that such a change may be made on receipt of "sufficient documentary and/or sworn evidence acceptable as a basis of such change or alteration."

[*Constitutional Objections Raised*]

In that first mandamus proceeding counsel for relatrix, not being aware of the act of 1942, LSA-R.S. 40:266, did not attack its constitutionality. This they do in the present suit, contending that the statute of 1942 is unconstitutional for three reasons: (1) That the statute is in violation of the Due Process clauses of the United States Constitution and of the Constitution of Louisiana of 1921; (2) That it is in violation of the Equal Protection clause of the Fourteenth Amendment of the United States Constitution; and (3) That it is an unconstitutional delegation of legislative authority.

Counsel for relatrix thus contend that, since the act is unconstitutional, there was no authority for the making of the change which was made by the registrar in this case and, in the alternative, that even if the statute is constitutional and does authorize such a change where the evidence justifies it, the evidence here shows that, as a matter of fact, Steve Rodi, Jr., the father of relatrix, was white and that, accordingly, the altered record should be corrected so as to show that fact.

Relatrix attacks the statute of 1942,—which we may say has now been amended by Act 237 of 1950 which amendment, however, does not affect in any way the matter which is before us,—on three grounds: (1) That if it permits that such a change as was made here may be made without notice, it in effect denies to those at interest and particularly to relatrix here due process of law as guaranteed by both the Constitution of the United States and the Constitution of 1921 of the State of Louisiana; (2) That it is an unconstitutional delegation of legislative authority to a purely administrative body; and (3) That it denies to those at interest the equal protection of the law.

[*Delegation Proper*]

The contention that the statute is an unconstitutional delegation of legislative authority is easily disposed of. If the statute authorized the registrar to make decisions as to what might or might not be best, then it would constitute an unconstitutional delegation of legislative authority, but the statute does not do that. It merely authorizes the registrar to reach a decision on questions of fact after securing evidence. Where a statute attempts to delegate authority to make fundamental decisions on what is best for the public welfare and there are no standards or uniform requirements, then there is an unconstitutional delegation. But where such a statute merely authorizes a registrar or a board to reach a conclusion on facts, that is not a delegation of legislative authority.

The distinction between unconstitutional delegation of legislative authority and the completely constitutional delegation of authority to determine facts and to enforce laws in accordance with those facts is set forth in American Jurisprudence, Volume 11, Constitutional Law, section 242, page 960:

> "There are no constitutional objections arising out of the doctrine of the separation of the powers of government to the creation of administrative boards empowered within certain limits to adopt rules and regulations and authorized to see that the legislative will expressed in statutory form is carried out by the persons or corporations over whom such board may be given administrative power. Boards and commissions of this character do not exercise any of the powers delegated to the legislature. They do not make any laws. They merely find the existence of certain facts, and to these

findings of fact the law enacted by the legislature is applied and enforced."

In 16 C.J.S., Constitutional Law, § 133, p. 558, it is stated that:

"* * * the legislature may make a law to delegate a power to determine some facts or state of things on which the law makes or intends to make its own action depend."

Our conclusion is that the statute does not effect an unconstitutional delegation of legislative authority.

The contention that the statute denies to the relatrix or to other persons at interest the equal protection of the laws is without foundation. The statute operates in all cases where the evidence justifies action and is not limited to any particular case or to any particular person or to persons of any particular race. In City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129, 131, which was a Zoning case, the Supreme Court held that there is no denial of equal protection where a statute provides regulations "which all persons similarly situated should be obliged to comply with."

[*Due Process*]

The contention that the statute effects a denial of due process of law is not so easily disposed of. In support of this contention counsel for relatrix argues that if the statute is constitutional it would, in effect, give to a registrar the right to annul a marriage, and thus to destroy a community of acquets and gains which might have resulted from the marriage; that the persons interested have a property right in maintaining that marriage and in maintaining the community of acquets and gains, and that this right cannot be destroyed by the action of an administrative officer such as a registrar and, particularly, that this may not be done without notice and without a hearing.

Where there is no legal marriage because of the fact that one of the parties is a Negro and the other white and thus the marriage, because of our miscegenation laws, is an absolute nullity then the so-called marriage, from the time it was performed, was an absolute nullity and the parties are not deprived of any substantive rights by the action of the registrar.

Often an administrative officer or body may make decisions on facts without notice to interested parties. To do so does not result in a denial of due process for there always exists the right of appeal to the courts to set aside any such change as was effected here.

In 16A C.J.S., Constitutional Law, § 628, p. 849, in a Headnote, appears the following:

"Due process of law may be afforded by administrative as well as by judicial proceedings. While the requirements of due process of law ordinarily apply to administrative proceedings, there is no denial of due process if notice and hearing are dispensed with in connection with purely preliminary matters, and the right to judicial review, where reserved, may cure any lack of due process in the original administrative proceedings,"

Also, in American Jurisprudence, Volume 11, section 242, page 962, appears the following:

"* * * administrative boards need not be required to act on sworn evidence, nor are they bound to act only after a hearing or to give a hearing to those asking for one. * * *"

This is especially true where the paramount public interest is involved.

We find interesting two statements in 16A C.J.S., Constitutional Law, § 602, one appearing at page 712 and reading as follows:

"It is not every interference with property rights that constitutes a deprivation of property without due process. While the general rule is that property rights shall be free of government interference, as discussed supra § 599, those rights are not absolute, since the rights of property are necessarily relative to those held by others under the same constitutional sanction; and equally fundamental with the private right is that of the public to regulate it in the common interest, for the protection of the safety, health, morals, or general welfare of the community, any loss resulting from such regulation being merely consequential."

The other statement which we find interesting is found in § 628, on page 851, reading as follows:

"* * * Procedural due process in administrative law is generally recognized to be a

matter of greater flexibility than when dealing with strictly judicial tribunals, * * *."

In the same volume and section of C.J.S., at page 857, appears the following:

"Where there is due provision for appeal to a judicial tribunal, no notice or hearing before the administrative tribunal is essential to due process. So if a hearing is not included in the administrative process it may be adequately supplied by a judicial proceeding in which new evidence may be supplied and full opportunity afforded for exploration of the basis of the disputed administrative order. * * *"

[*Appeal Available*]

While it is true that, in the statute with which we are concerned, there is no express provision for appeal to the courts, it has always been recognized that the parties interested in such a situation may, by mandamus, attempt to have records corrected in accordance with the true facts. Unfortunately, in this state there have been many such cases, notably, Sunseri v. Cassagne, supra, State ex rel. Treadaway v. Louisiana State Board of Health, La. App., 56 So.2d 249, and Green v. City of New Orleans, La. App., 88 So.2d 76.

The complete impracticability of requiring notice and a hearing in such cases is made apparent by the facts which are found here where it is shown that almost innumerable persons will be affected. What members of the family must be notified? What members of the family must be present at a hearing? After the second or third generation innumerable children, grandchildren and great grandchildren may be interested. It would be completely impracticable to hold that a correction could not be made in the public record unless a notice and opportunity to be heard had been given to each person who, as a blood descendant, might be interested in the matter.

Our conclusion is that the statute in question does not effect a denial of due process of law and our conclusion on the whole question of constitutionality is that the statute is not unconstitutional.

[*Burden of Proof*]

When we come to consider the facts we find a controversy over the question of who should be required to prove the correctness or incorrectness of the record and just how much proof should be required.

On behalf of relatrix it is argued that we should first decide whether the Bureau was justified by the evidence which it obtained in making the change from white to colored and that until the Bureau has convinced the Court that it had sufficient evidence to make that change the relatrix is not called upon to prove that the change which was then made should be deleted and that the registration of the race of Rodi, Jr., as white should be reinstated.

Our attention is directed to the fact that in Sunseri v. Cassagne, supra, the Supreme Court laid down a rule that a change in such a registration should not be made unless the proof is so overwhelming as to justify the conclusion that there is practically no doubt at all. In other words, that neither a preponderance of evidence nor even proof beyond a reasonable doubt is sufficient to warrant such a change; that there must be such proof as will almost justify the conclusion that there is no doubt at all.

In the Sunseri case the Supreme Court said that the marriage of defendant which was attacked on the ground that she was a Negress "should not be annulled * * * unless [all] the evidence adduced leaves no room for doubt that such is the case."

[*Degree of Proof*]

Following this, in State ex rel. Treadaway v. Louisiana State Board of Health, supra, [56 So.2d 250] we referred to the decision of the Supreme Court and said: "We feel that the language used by the Supreme Court means that there must be no doubt at all."

It is conceded by counsel for the City that, before the act of 1942, such proof was necessary, but that, as a result of that act, the registrar, when he feels that there has been an error in such registration and obtains satisfactory evidence as to the correct race of the person on whom the registration is based, it may, on such evidence, make such change as is thereby justified, but that if a third person attempts to force the Bureau to make such a change, the proof produced must, as was held by the Supreme Court in the Sunseri case, and by us in the Treadaway case, be so convincing as to leave practically no doubt at all.

We feel that the City is correct and that, hav-

ing obtained evidence which left no reasonable doubt in the minds of the officials as to the race of Rodi, Jr., it was justified in making the change which it made, and that it cannot be forced to make the alteration demanded by relatrix when the evidence leaves no room for doubt.

[*Evidence Adduced*]

Let us consider what evidence was produced. The relatrix is the daughter of of Steve Rodi, Jr., who, as stated, is sometimes referred to as Steve Rodi, II. He was the son of Steve Rodi, Sr., and Herbertine or Huberine Dennise. It is conceded by the City that Steve Rodi, Sr., was white and it follows that unless the mother, Huberine Dennise, was colored, then relatrix is correct and the race of her deceased father, Steve Rodi, Jr., should be shown as white, for if it is shown conclusively that both parents of a person are of the white or Caucasian race then the inescapable conclusion is that that person is also white.

As already stated, the doctor who attended Rodi in his last illness and the undertaker who interred his remains, and the sexton of the cemetery all stated that they thought he was white, but no one of these persons knew the family at all. In addition to these witnesses, several members of the Rodi family testified that both the father, Steve Rodi, Sr., and the mother, Herbertine or Huberine Dennise, were white. However, insofar as Huberine Dennise is concerned there is annihilating testimony to the contrary.

Dr. J. T. Reeves, the Coroner of Plaquemines Parish in which Rodi lived practically all of his life, stated that he was well acquainted with the Rodi family, that the members of that family were his patients, that they always used his colored waiting room and never attempted to use the white waiting room and that he had no doubt at all that they were colored. Dr. Reeves says that he knew Frank or Francois Rodi who was generally known to be a brother of Steve Rodi, Jr., and that at Frank's death he, Dr. Reeves, executed the death certificate, and in the presence of Frank's wife stated in the certificate that Frank was colored.

Some members of the Rodi family stated that they did not know who Frank Rodi was; that he was not a brother of Steve Rodi, Jr., and they attempted to create the impression that Frank was probably an illegitimate son of Herbertine or Huberine Dennise by a colored father and not by Steve Rodi, Sr. However, the death certificate of Frank Rodi shows him to be colored and also shows that he was the son of Steve Rodi and Herbertine Dennise. If so, then he was the brother of Steve Rodi, Jr., and except for the testimony to which we have already referred, there is nothing in this record to show the contrary.

John C. deArmas, the Parish Engineer, says he was familiar with the Rodi family, all of whom lived near Buras; that he knew Steve's mother and that she was a Negress and that Steve Rodi, Jr., was himself a Negro. He says none of the family claimed to be white and that their associates were always Negroes.

[*Birth Certificates*]

Among many of the vital statistics records offered in evidence are several which are most revealing. One shows the registration of the birth of a daughter, Huberine Ida Denise, to the parents, Francoise Maldonata Desmolle and Francois Rodi who, as the evidence seems to indicate, was a brother of Steve Rodi, and this certificate shows that the mother and the father were both colored. The midwife who assisted at this birth was Mrs. Francois Desmolle and the similarity of the names, both the given and the family name, indicate that, as other evidence shows, she was a member of the same family.

Another of these certificates shows the birth of a son, Albert Rodi, to Stephen Rodi and Henriette Demolle. The race of this child is not given but the race of both parents is given as colored and the midwife who registered the birth was Mrs. Lacoste Sylve.

Another certificate shows the birth of a daughter, Martha Rodi, to Stephen Rodi and Henriette Demolle, and here again the race of both parents is given as colored. Here again the midwife was Mrs. Lacoste Sylve.

Still another certificate shows the birth of a daughter, Etta Rodi, to Stephen Rodi and Henriette Demolle and again the certificate shows the race of the parents as colored and again the midwife was Mrs. Lacoste Sylve.

Mrs. Bettha North, another midwife of the Parish, said that she knew Steve Rodi, Jr. and that he was a Negro, and she said that the two midwives who had registered the births of the several children just mentioned were both colored and were both members of the Rodi family, and, as already stated, that seems to be indi-

cated by the similarity of the names of one of the midwives, Mrs. Francois Desmolle.

Mrs. North stated that more than fifty years before she had known Huberine Dennesse and that she knew she was colored "because she said so." This statement is attacked by counsel for relatrix who say that it is inconceivable that Mrs. North could have remembered such a statement for more than fifty years.

[*Testimony of Midwives*]

The fact that the two midwives were members of the family of the deceased husband of the relatrix and that they, in giving the information on which these certificates were prepared, stated that Steve Rodi was colored weighs heavily against the contention of relatrix.

Another witness who said that he had been a lifelong resident of the Parish, that he lived near the Rodi family, and that the brothers, Francois and Steve Rodi, Jr., were colored was Steve Mistich, and when asked "what color were they?" he answered: "They were supposed to be negro on the mother's side * * *." He said that the Rodi children, Frank and Steve, and the sisters did not go to the places to which white people went.

[*U.S. Census*]

The relatrix places great reliance on the fact that among the census records of the United States there are some which were made in 1850, in 1860 and in 1880 and that on these records are shown the names of various families which are in the background of the Rodi family and that nowhere in those records is it shown that any of them were colored. The names referred to are Rodi, Roddi, Demolle and Dennese. On these records there are columns for the entering of the race of the persons listed. On some of them, after each name appears the letter W, obviously meaning white, and in some there is no entry at all. In referring to the fact that he did not place too much reliance on those records for the purpose of determining the issue presented here, the District Judge very properly said:

> "The Census report is nothing more than a record of information given by the subject interrogated to the Census taker for statistical purposes; the latter is not an investigator, and must accept information as given unless it is obviously, or personally known to him, to be incorrect. The subject being interviewed could be of negro blood, yet look Caucasian. These Census Exhibits are part of the whole picture, but are not conclusive in themselves."

[*"Flag List" Kept*]

Mrs. Naomi M. Drake, Deputy Registrar of the Board of Health of the City and Recorder of the Bureau of Vital Statistics, stated that when it came to the attention of the Bureau that the record of the death of Steve Rodi showed him to be white, the officials were surprised because they kept what is called a "flag list" of certain families known to be colored, but who sometimes erroneously claimed to be white, and that on this list were the names DeMolle, Silve or Sylve, Encalade, Rodi and Dennese. She said that thereafter she personally went to Plaquemines Parish where the family of Steve Rodi had lived for years and spent several days making a thorough investigation, and that, as a result of this and because of the various certificates already referred to, the officials were convinced that there was no doubt at all that Steve Rodi whose death was recorded and whose race is involved here was colored. She said: "I made these trips to Pointe-a-la-Hache and I checked various records. I interviewed numerous people, some of whom did not want to be called as witnesses and some who volunteered to come as witnesses on another case." She said that not only was it determined that Steve Rodi, Jr., should have been registered as colored but that obviously there had been an effort to confuse the issue by stating on the certificate that his wife was Henrietta Maxion whereas, as a matter of fact, his wife was Henrietta Demolle, a member of the Demolle family, which, according to the records of the Bureau, was known to be colored.

Anthony Ciaccio, State Registrar of Vital Statistics, gave testimony quite similar to that of Mrs. Drake. He says that he knew "pretty much all of the names of the negro families in the other parishes * * * and * * * in the Parish of Orleans." He said, too, that in the State Bureau there is maintained a "flag list" which seems to be similar to that maintained in the City Bureau and that on that list are the names Rodi, Demolle and Denesse. He said that he, too, made several trips to Pointe-a-la-

Hache, interviewed numerous people and became absolutely convinced that Steve Rodi, whose death had been recorded was colored.

[*Residence in "Coon Town"*]

As pointed out by the District Judge, the record indicates that Steve Rodi, Sr., the father, and Steve Rodi, Jr., the son, lived in Buras, in Plaquemines Parish, in a settlement known as "Coon Town" and that, as is well known, the word "coon" used in that association is a colloquial expression meaning Negro. The witnesses said that only colored families lived in Coon Town.

Edward Pelas, placed on the stand on behalf of relatrix, said that the name Coon Town was not based on the race of the people who lived there, that that settlement was called Coon Town because many raccoons were killed there by hunters.

It is true that it is conceded that the father, Steve Rodi, Sr., was white and from this it necessarily follows that if Steve Rodi, Jr., was colored, the colored blood came from the mother's side, that is, from Huberine Dennise or Dennease, Denise, or Denis, as the name appears in different records. And it is true that there is some evidence to the effect that the children of Steve Rodi, Sr., were, by some persons, considered as white, for instance, this statement is made by the witness Pelas just referred to. However, the record shows that Pelas had not known the Rodi family for about fifty years.

Our examination of the record leads to the conclusion that there is no doubt at all that the contention of relatrix is not well founded and that her deceased father was actually colored and a more detailed discussion of the already extensive reference to the evidence would serve no useful purpose.

[*Importance of Decision*]

We fully realize the extreme importance of reaching the proper conclusion on a matter of such supreme importance to those who are involved. We feel that nothing can possibly be of more importance than for a person to be absolutely certain as to his genealogy and particularly as to his race. We know that a white person has an absolute right to be known as white and a colored person has the same right to be known as colored, and we know that in this area nothing can cause greater distress and humiliation to those who believe themselves to be of one race and then to find that they have in their veins blood of another. Therefore, in such cases as this, and unfortunately there have been several, we do not reach a conclusion until we have studied every word in the record and have weighed the testimony most carefully. We have done so here and regret that we can reach but one conclusion, that is, that the Steve Rodi whose death was recorded was in fact of the Negro race. We think that is shown not only beyond a reasonable doubt but to the certainty which should be required in such cases. The District Judge so concluded also, for when, in the hearing on the application for rehearing, he was shown that in his original opinion he had used the words, "by a preponderance of the evidence" he stated that he realized that the proof must leave no doubt and, in his original opinion, inserted the words: "beyond any doubt."

Since we conclude that the evidence leaves no doubt as to the race of Steve Rodi, the result would be the same even if we are in error in our conclusion that the statute of 1942 is constitutional.

[*Bureau Correction Authorized*]

Even without that statute, such a Bureau is authorized by a judicial decision to make such a change. That was the exact situation which was presented in the Sunseri case. There the Bureau in issuing a copy of a certificate made a change to show the race as colored rather than as white and when a mandamus proceeding was brought to attempt to force the Bureau to alter the record so as to show the race as white, the Bureau resisted and produced evidence to show that the change which had been made was correct. The Supreme Court ultimately reached the conclusion that the change was correct. Therefore the decision in that case did not come from a proceeding brought by the Bureau but came as a result of a proceeding brought against the Bureau which is exactly what has been done in this case.

Our conclusion therefore is that even if the Bureau did not have the right to make the change originally, and we think that it did

have that right, nevertheless since the change was made and since we conclude that it was properly made, the suit of the relatrix was properly dismissed.

Accordingly, the judgment appealed from is affirmed at the cost of appellant.

Affirmed.

FAMILY RELATIONS
Miscegenation—Maryland

STATE of Maryland v. Shirley Ann HOWARD

Criminal Court of Baltimore, Maryland, The Daily Record, Baltimore, April 22, 1957.

SUMMARY: A section of the Maryland criminal code, derived from a statute first enacted in 1699, provides for criminal penalties to be imposed upon "Any white woman who shall suffer or permit herself to be got with child by a Negro or mulatto." An indictment was brought against a white woman for having violated that section. She moved to dismiss the indictment on grounds the statute was invalid. The court held the statute to be violative of the Equal Protection Clause of the Fourteenth Amendment, citing one of the *School Segregation Cases*, and dismissed the indictment. The court held the statute required punishment only of a female of the white race and was therefore discriminatory.

NILES, Chief Judge.

This case comes before the Court on a motion to dismiss an indictment against the defendant for violating Sec. 513 of Article 27 of the Public General Laws of Maryland, which provides as follows:

> "Any white woman who shall suffer or permit herself to be got with child by a Negro or mulatto, upon conviction therof in the Court having criminal jurisdiction, either in the city or county where such child was begotten or where the same was born, shall be sentenced to the penitentiary for not less than eighteen months nor more than five years."

Historical research by counsel for the defendant indicates that this statute was enacted in different form in 1699 (Acts 1699 c. 43); the annotations in the Code are to the effect that in its present form it was enacted in 1715 (Acts 1715, c. 44, sec. 25).

It also appears that the original act of 1699 contained a provision that any white man convicted of having gotten any Negro woman with child should undergo the same penalties as a white woman; but this provision was apparently repealed by omission from the Code of 1860, and is not contained in the present Code.

[*No Previous Prosecution*]

The statute now under consideration was thus enacted more than 250 years ago. No case has been decided by the Court of Appeals of Maryland in which its validity has been passed upon. The Court is informed also that as far as can be ascertained the present case is the only prosecution under this statute ever brought in the City of Baltimore.

The question presented is whether the statute is valid.

Arguments have been earnestly presented by counsel, to the effect that the statute is invalid by reason of its being obsolete; that it is void as being too vague to be enforceable, since the words "white woman," "Negro," and "mulatto" are not defined, and that no standards are therein contained whereby the Court may reach an exact definition; that these words have changed in meaning since 1699 when the statute was first enacted; that the statute invades the defendant's civil rights; and that the statute is void under the principles set forth in the recent school segre-

gation case of Brown v. Board of Education, (1954) 347 U. S. 483.

In the view taken by the Court, it is unnecessary to express an opinion on these points, since the decision is controlled by the basic principle that a statute is not valid if it prescribes different punishments or penalities for the same type of conduct when engaged in by persons of different race or color.

[*Effect of Statute*]

The statute penalizes conduct resulting in the procreation of children of mixed race. Four separate categories of persons may by their conduct cause a woman to become pregnant by illicit sexual intercourse with a member of another race, namely, a white man, a white woman, a Negro man and a Negro woman. Sexual intercourse between any of these persons, if of different race and sex, may result in the conception of a child of mixed race. A penalty is imposed, however, only upon a white woman who participates in such conduct. No penalty is imposed upon the Negro man involved. Furthermore, if a Negro woman should become pregnant by a white man, no penalty is imposed upon either the man or the woman.

The basic principle invoked by the defendant was stated by the Supreme Court of the United States in Pace v. Alabama (1882) 160 U.S. 583, cited by both sides herein. In that case a statute of Alabama prescribed a penalty for fornication or adultery, and a more severe penalty for such conduct where the participants were of different races; no distinction was made as to sex. The same penalty was prescribed for both the man and the woman. Under that statute both a Negro man and a white woman were convicted. The man appealed on the ground that the statute infringed his constitutional rights to equal protection of the laws under the 14th Amendment.

Mr. Justice Field, in delivering the opinion of the Court, said:

> "Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment. * * * Whatever discrimination is made in the punishment prescribed in these two sections is directed against the offense designated, and not against the person or any particular color or race. The punishment of each offending person whether white or black, is the same."

The statute in the present case is not directed against the offense, but against one of the offending persons.

The Supreme Judicial Court of Massachusetts, in Re Opinion of the Justices (1911) 207 Mass. 601 said:

> "The fact that a man is white or black, or yellow is not a just and constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of a different color."

In Bolling v. Sharpe, (1954) 347 U.S. 497, the Supreme Court of the United States stated that classifications based solely upon race must be scrutinized with particular care, since they are constitutionally suspect. It reaffirmed the principle

> "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. * * *"

It is argued on behalf of the State in this case that since marriage between the races is unlawful, under Art. 27 sec. 466, a child begotten by parents of different races must necessarily be illegitimate, and therefore the penalties of the bastardy laws apply to the man involved, thus equalizing the situation as between the sexes. The argument seems to this Court to be fallacious, for the bastardy statute applies to men and women of all races without discrimination. Furthermore, the bastardy statute prescribes no penalty at all upon either the putative father or the mother if bond be given to the State for the support of the child. Code, Art. 12, sec. 8, 10.

Although it is perfectly clear, as stated in argument, that no one has a constitutional right to beget or bear an illegitimate child, this case is not concerned with such a question, but with the question of discrimination by reason of imposing different penalties upon persons of different race or sex for the same conduct. See Plunkard v. State (1887) 67 Md. 364.

This statute applies unequally to the conduct which it prohibits, in that it penalizes one class

of guilty persons solely on the grounds of race. In the opinion of the Court the statute is unconstitutional and void, since it violates the principle of equal protection of the law under the 14th Amendment to the Constitution of the United States.

For the above reasons, the motion of the defendant to dismiss the indictment is granted.

CORPORATIONS
NAACP—Texas

The State of TEXAS v. The NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a corporation, et al.

District Court, 7th Judicial District, Smith County, Texas, May 8, 1957, No. 56-649.

SUMMARY: The State of Texas brought a bill in a state court seeking an injunction to restrain the NAACP and a number of affiliated organizations from carrying on certain activities and "doing business" in the state. On September 21, 1956, prior to hearing, a temporary restraining order was issued against the defendants. On September 28, 1956, a hearing was held at which the court found that the defendants had unlawfully carried on lobbying and political activities, solicited litigation in the state and had failed to pay franchise taxes. A temporary injunction was issued restraining the defendants from carrying on activities in the state and from soliciting contributions or exercising any corporate functions or qualifying to do business in the state. 1 Race Rel. L. Rep. 1068 (1956). Thereafter, on April 29, 1957, after a further hearing the court found that some of the activities of the NAACP and its affiliated organizations constituted "doing business" in the state illegally. A permanent injunction, which in some respects modified the temporary injunction, was issued. Under the permanent injunction the Association is required to file certain reports and make payment of franchise taxes. It is permitted to conduct "educational and charitable" activities in the state but is forbidden from engaging in litigation or lobbying.

DUNAGAN, J.

On the 29th day of April, 1957, duly and timely came to be heard and considered the above entitled and numbered cause and came the State of Texas, acting by and through the Attorney General, and came the Defendants hereafter named, being all of the Defendants in this cause, by and through their respective attorneys and all parties announced ready for trial. A jury having been waived, all matters of fact, as well as of law, were submitted to the Court sitting without a jury, and the Court having heard the pleadings, the evidence and arguments of counsel, finds, declares and concludes therefrom that the Defendants, The National Association for the Advancement of Colored People and its one hundred thirteen (113) unincorporated branches, including the Texas State Conference of Branches and the Southwest Regional Conference of the N.A.A.C.P.: Branch No. 1, Area 10, Abilene, Texas; Branch No. 2, Area 13, Amarillo, Texas; Branch No. 3, Area 4, Austin, Texas; Branch No. 4, Area 5, Austin County (Sealy, Bellville), Texas; Branch No. 5, Area 4, Bastrop, Texas; Branch No. 6, Area 2, Bay City, Texas; Branch No. 7, Area 5, Baytown, Texas; Branch No. 8, Area 6, Beaumont, Texas; Branch No. 9, Area 5, Brazos County (Bryan), Texas; Branch No. 10, Area 1, Beeville, Texas; Branch No. 11, Area 11, Big Spring, Texas; Branch No. 12, Area 5, Brookshire, Texas; Branch No. 13, Area 10, Brownfield, Texas; Branch No. 14, Area No. 12, Brownwood, Texas; Branch No. 15, Area 4, Burton, Texas; Branch No. 16, Area 5, Carmine, Texas; Branch No. 17, Area 4, Brenham, Texas; Branch No. 18, Area 1, Corpus Christi, Texas; Branch No. 19, Area 12, Corsicana, Texas; Branch No. 20, Area 6, Crockett, Texas; Branch No. 21, Area 8, Dallas, Texas; Branch No. 22, Area 8, Denison, Texas; Branch No. 23, Area 2, Eagle Lake, Texas; Branch No. 24, Area 1, Edinburg, Texas; Branch No. 25, Area 4, Elgin, Texas; Branch No. 26,

Area 8, Ellis County (Ennis), Texas; Branch No. 27, Area 11, El Paso, Texas; Branch No. 28, Area 2, Fort Bend County, Texas; Branch No. 29, Area 9, Fort Worth, Texas; Branch No. 30, Area 4, Franklin, Texas; Branch No. 31, Area 2, Freeport, Texas; Branch No. 32, Area 5, Galveston, Texas; Branch No. 33, Area 8, Garland, Texas; Branch No. 34, Area 4, Greggton, Texas; Branch No. 35, Area 7, Gilmer, Texas; Branch No. 36, Area 8, Greenville, Texas; Branch No. 37, Area 6, Hardin, Texas; Branch No. 38, Area 1, Harlingen, Texas; Branch No. 39, Area 7, Harrison County (Marshall), Texas; Branch No. 40, Area 4, Hearne, Texas; Branch No. 41, Area 7, Henderson, Texas; Branch No. 42, Area 7, Henderson County, Texas; Branch No. 43, Area 5, Hitchcock, Texas; Branch No. 44, Area 7, Hooks, Texas; Branch No. 45, Area 5, Houston, Texas; Branch No. 46, Area 12, Itasca, Texas; Branch No. 47, Area 8, Kaufman, Texas; Branch No. 48, Area 7, Kilgore, Texas; Branch No. 49, Area 1, Kingsville, Texas; Branch No. 50, Area 4, LaGrange, Texas; Branch No. 51, Area 4, LaMarque, Texas; Branch No. 52, Area 10, LaMesa, Texas; Branch No. 53, Area 6, Liberty County, Texas; Branch No. 54, Area 10, Littlefield, Texas; Branch No. 55, Area 7, Longview, Texas; Branch No. 56, Area 10, Lubbock, Texas; Branch No. 57, Area 4, Luling, Texas; Branch No. 58, Area 4, Lyons, Texas; Branch No. 59, Area 5, Madison County, Texas; Branch No. 60, Madisonville, Texas; Branch No. 61, Area 9, Mansfield, Texas; Branch No. 62, Area 12, Marlin, Texas; Branch No. 63, Area 11, McCamey, Texas; Branch No. 64, Area 11, Midland, Texas; Branch No. 65, Area 7, Mineola, Texas; Branch No. 66, Area 9, Mineral Wells, Texas; Branch No. 67, Area 11, Monahans, Texas; Branch No. 68, Area 9, Moshier Valley, Texas; Branch No. 69, Area 7, Mt. Pleasant, Texas; Branch No. 70, Area 7, Nacogdoches, Texas; Branch No. 71, Area 3, New Braunfels, Texas; Branch No. 72, Area 11, Odessa, Texas; Branch No. 73, Area 6, Orange, Texas; Branch No. 74, Area 7, Paris, Texas; Branch No. 75, Area 11, Pecos, Texas; Branch No. 76, Area 8, Plano, Texas; Branch No. 77, Area 7, Ponta, Texas; Branch No. 78, Area 6, Port Arthur, Texas; Branch No. 79, Area 10, Quanah, Texas; Branch No. 80, Area 2, Refugio, Texas; Branch No. 81, Area 1, Robstown, Texas; Branch No. 82, Area 12, Runnels County, Texas; Branch No. 83, Area 7, Rusk, Texas; Branch No. 84, Area 12, San Angelo, Texas; Branch No. 85, Area 3, San Antonio, Texas; Branch No. 86, Area 4, San Marcos, Texas; Branch No. 87, Area 4, Schulenberg, Texas; Branch No. 88, Area 3, Seguin, Texas; Branch No. 89, Area 8, Sherman, Texas; Branch No. 90, Area 2, Shiner, Texas; Branch No. 91, Area 1, Sinton, Texas; Branch No. 92, Area 10, Slaton, Texas; Branch No. 93, Area 4, Smithville, Texas; Branch No. 94, Area 10, Spur, Texas; Branch No. 95, Area 7, Sulphur Springs, Texas; Branch No. 96, Area 4, Taylor, Texas; Branch No. 97, Area 12, Temple, Texas; Branch No. 98, Area 8, Terrell, Texas; Branch No. 99, Area 7, Texarkana, Texas; Branch No. 100, Area 5, Texas City, Texas; Branch No. 101, Area 7, Troup, Texas; Branch No. 102, Area 7, Tyler, Texas; Branch No. 103, Area 9, Vernon, Texas; Branch No. 104, Area 9, Victoria County, Texas; Branch No. 105, Area 12, Waco, Texas; Branch No. 106, Area 8, Waxahachie, Texas; Branch No. 107, Area 2, West Columbia, Texas; Branch No. 108, Area 5, Wharton County, Texas; Branch No. 109, Area 8, White Rock, Texas; Branch No. 110, Area 9, Wichita Falls, Texas; Branch No. 111, Area 7, Winnsboro, Texas; Branch No. 112, Area 2, Yoakum, Texas are forbidden by the laws of the State of Texas from engaging in the following acts, and that the following order, judgment and decree shall be entered:

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the Defendants, The National Association for the Advancement of Colored People, and its one hundred thirteen (113) unincorporated branches above named, including the Texas State Conference of Branches and the Southwest Regional Conference of the N.A.A.C.P., have no lawful right under the laws of Texas, and IT IS ORDERED AND ADJUDGED that each and all of them be and they are hereby permanently and perpetually restrained and enjoined from

(a) Engaging in the practice of law;

(b) For their own profit, or with the intent to distress or harass the defendant therein, willfully instigating, maintaining, exciting, prosecuting or encouraging the bringing in any court in this State, Federal or State, of a suit at law or equity in which such defendant has no direct interest, or financing any such suit, or violating Article 430 of the Penal Code of the State of Texas;

(c) Seeking to obtain employment in any

claim to prosecute or defend an action by means of personal solicitation for such employment, or by procuring another to solicit for said defendant employment in such claim;

(d) Inciting or soliciting lawsuits for filing or soliciting persons to file, maintain or prosecute lawsuits; or financing lawsuits so solicited or incited by the said defendants, or any of them;

(e) Hiring or paying any litigant to bring, maintain or prosecute a suit;

(f) Engaging in political activities, contrary to the laws of the State of Texas; and

(g) Engaging in lobbying activities contrary to the laws of the State of Texas, and

writ of injunction shall issue accordingly; and

The Court further finds that the Defendant, National Association for the Advancement of Colored People, has done business in Texas since 1915, and is a non-profit corporation doing both interstate and intrastate business within the State of Texas and as such under the law is not required under existing law to obtain a permit to do business within the State though it is under the law required to file franchise tax reports or returns and to pay franchise taxes for the privilege of operating as a corporation within the State; and

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the State of Texas do have and recover of and from the Defendant, The National Association for the Advancement of Colored People, all accrued franchise taxes, plus interest and penalties, including penalties for the late filing of franchise tax reports or returns, lawfully due the State by the Defendant, and IT IS ORDERED that the said Defendant shall pay such franchise taxes, interest and penalties, as are due and owing the State within thirty days after a determination of the amount due the State, and if such payment is not made the Defendant shall forfeit its right to do business in the State of Texas; and IT IS FURTHER ORDERED that said Defendant make franchise tax returns required to date, and in the future, and said Defendant shall keep and make available to the Secretary of State such financial records as are necessary for the State to determine the amount of franchise tax for any given fiscal or calendar year, and

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the Defendant, The National Association for the Advancement of Colored People, and said defendant branches permit an examination of its and their books, records and accounts during business hours upon request of the Attorney General of Texas when such request is made in writing under the powers granted the Attorney General by the laws of the State of Texas to determine compliance with the laws of the State of Texas, and that said Defendants shall make available all of said books, records and accounts as may be requested by the State Auditor of Texas to determine its franchise tax liabilities to the State of Texas for past and future years, and

IT IS FURTHER ORDERED that said Defendant, National Association for the Advancement of Colored People, and said defendant branches, shall maintain an agent for service in the State of Texas for so long as it engages in business within the State, and

The Court further finds that each of the named 111 Defendant individual branches of the National Association for the Advancement of Colored People, The Texas State Conference of Branches and the Southwest Regional Conference of N.A.A.C.P. are the agents and subservient branches of the N.A.A.C.P. and therefore an integral part of said National Association for the Advancement of Colored People and as such are subject to its direction and control and are not required to file under the "assumed name" statute of the State of Texas.

The Court further finds and concludes from the pleadings, the evidence and arguments of counsel, that the Defendant, N.A.A.C.P. Legal Defense & Educational Fund, Inc., is forbidden by the laws of the State of Texas from engaging in the following acts, and that the following order, judgment and decree shall be entered:

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the Defendant, N.A.A.C.P. Legal Defense & Educational Fund, Inc., has no lawful right under the laws of Texas, and IT IS ORDERED AND ADJUDGED that it shall be and is hereby permanently and perpetually restrained and enjoined from

(a) Engaging in the practice of law;

(b) For their own profit, or with the in-

tent to distress or harass the defendant therein, willfully instigating, maintaining, exciting, prosecuting or encouragthe bringing in any court in this State, Federal or State, of a suit at law or equity in which such defendant has no direct interest, or financing any such suit, or violating Article 430 of the Penal Code of the State of Texas;

(c) Seeking to obtain employment in any claim to prosecute or defend an action by means of personal solicitation for such employment, or by procuring another to solicit for said defendant employment in such claim;

(d) Inciting or soliciting lawsuits for filing or soliciting persons to file, maintain or prosecute lawsuits; or financing lawsuits so solicited or incited by the said defendants, or any of them.

(e) Hiring or paying any litigant to bring, maintain or prosecute a suit;

(f) Engaging in political activities, contrary to the laws of the State of Texas; and

(g) Engaging in lobbying activities contrary to the laws of the State of Texas, and

writ of injunction shall issue accordingly; and

The Court further finds that the Defendant, N.A.A.C.P. Legal Defense & Educational Fund, Inc., is a non-profit corporation doing interstate business within the State of Texas and as such under existing law is not required to obtain a permit to do business within the State.

The Court finds that the business within the State of Texas by a foreign corporation such as the National Association for the Advancement of Colored People and its affiliated organizations is only a privilege that the State may confer, extend or withhold, and it is not a right which the corporation possesses and therefore the State is free and has the power to prescribe and regulate the terms upon which a foreign corporation may come into the State and transact business.

The Court further finds that the business of the National Association for the Advancement of Colored People, including that of its abovenamed branches, is now completely divorced and separated from the business of the Defendant, N.A.A.C.P. Legal Defense & Educational Fund, Inc., and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants, National Association for the Advancement of Colored People and the N.A.A.C.P. Legal Defense & Educational Fund, Inc., shall be enjoined from doing other than educational and charitable activities within the State as are authorized by their respective charters, and writ of injunction shall issue accordingly.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Temporary Injunction heretofore issued herein is hereby dissolved.

All relief prayed for by any party hereto and not granted herein is specifically denied, and any party not disposed of herein is dismissed.

The costs are assessed and taxed against the Defendants for which let execution issue.

It appearing to the Court that the State of Texas is Plaintiff in this cause, it is not required under the laws of this State to give bond, none is required.

To which action of the Court, the Defendants except and give notice of appeal to the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas, sitting at Texarkana, Texas.

SIGNED and entered this the 8th day of May, 1957.

CIVIL DISTURBANCES
"Cross Burning"—Florida

The State of Florida, The City of MIAMI v. Frank L. FOSTER, Jr., et al.

Municipal Court in and for the City of Miami, Dade County, Florida, March 6, 1957, Case Nos. 33489 etc.

SUMMARY: Four persons in Miami, Florida, were charged with a breach of the peace and unlawful assembly by "placing or causing to be placed, a cross on the property of another"

and by "placing or causing to be placed any exhibit of any kind whatsoever with the intention of intimidating any person or persons." The charges arose out of a "cross-burning" incident connected with racial disturbances in that city. Upon trial in a municipal court the four defendants were convicted and sentenced to fines and terms of imprisonment. A portion of the oral statement of the court, GOLDMAN, J., at the trial is set out below:

* * *

THE COURT: It is this court's judgment that each of you had a complete disregard for the rights of others, and it is this court's opinion this is a heinous offense. We have certainly got enough trouble in this world as it is today, with the state of unrest throughout the world, without having something like this. It is therefore the judgment of this court that each of you are guilty as charged.

Mr. Foster, it is the judgment of this court you are guilty, and I order you to serve a term of sixty days in the city jail and pay a fine of five hundred dollars or serve an additional sixty days on each of the two counts you are charged with.

Mr. McSwiney, it is also the judgment of this court you are guilty as charged on each of your two counts. The only thing regrettable about this is that the charter only allows me to go so far as to the penalty. I order you to serve a term of sixty days in the city jail and pay a fine of five hundred dollars or serve an additional sixty days in lieu thereof in each of your individual cases.

Mr. Hockett, it is also the judgment of this court you are guilty of the two offenses. You gentlemen have struck at the very basis of our democracy and the principles for which it stands. Taking the law into one's own hands is certainly not condoned by this court.

Mr. Shaver, on your plea of nolo contendere it is the judgment of this court you are guilty as charged. For your part in this offense, and your cooperation, the court is going to be lenient with you and sentence you to the term of thirty days in the city jail and pay a fine of one hundred dollars or serve an additional thirty days on each count. I am going to suspend the jail sentence in your particular case in each of your two counts, but if there is a recurrence of this or any other thing occurs, you will stand committed to the city jail for the terms set forth.

* * *

CIVIL DISTURBANCES
Grand Jury Investigations—Georgia

An investigation was recently conducted by a regular grand jury in Sumter County, Georgia, into alleged incidents of violence and civil disturbances at Koinonia Farms Inc., a bi-racial communal group operating a farm and selling farm products near Americus, Georgia. In its report, dated April 5, 1957, the grand jury stated that it found no evidence of insufficient law enforcement in connection with the incidents of violence. The Grand Jury presentments follow:

GRAND JURY PRESENTMENTS

We, the grand jury for the November Term 1956 of Sumter Superior Court have completed our work for this term of court and wish to submit the following presentments.

During our deliberation we returned three true bills.

It was brought to our attention from various sources that acts of violence were being perpetrated within the County and various forms of publicity have been circulated throughout the nation which are detrimental to the good name of Sumter County and its citizens. We have made an investigation of the reported violence and find that said reported violence is centered around and connected with what is known as Koinonia Farm Inc. Our investigation of this reported violence has been thorough and exhaustive. We have had before us witnesses, including officers, members of this corporation, their visitors and temporary residents, the records of said corporation, as well as physical evidence, in connection with this investigation.

Our investigation reveals the following facts:

FINDINGS OF FACT, SUPPORTED BY EVIDENCE BEFORE THE GRAND JURY

We find that Koinonia Farm is in fact a Corporation, and that the same was chartered by the Commonwealth of Kentucky on October 15, 1942 as a non-profit religious corporation. The names of the incorporators and stock holders at that time and so far as we know at the present are: Clarence L. Jordan, Florence K. Jordan, Martin England and Mabel Orr England.

The corporation has never been domesticated as a Georgia corporation. However it has been registered to do business as a foreign corporation with the Secretary of State of the State of Georgia, said registration having taken place in November, 1942.

This corporation started doing business in Sumter County, Georgia in November, 1942 with a net worth of $2500.00. Said corporation now has a net worth of over $150,000.00 and has made a profit of over $150,000.00.

We find that prior to July 1, 1956, after a thorough examination of its records, there is listed separate columns for farm operations, traveling expenses, and many other columns of entry, but same do not provide any column whereby gifts, donations or funds from solicitation appear. It does appear that a column was set up in its books bearing the heading "GIFTS" at a time contemporaneously with the first act of reported violence. The corporation's records show that more than $14,500.00 as gifts and donations was received by said corporation during the year 1956, after the first reported act of violence.

The corporation established a roadside market in 1954 on U. S. Highway #19, south of Americus, Georgia. Before the reported acts of violence began in July, 1956, said roadside market's yearly sales amounted to approximately $7,000.00 per year. After said reported violence began said corporation started doing a mail order business in connection with the roadside market and said corporation's sales increased to over $7,000.00 PER MONTH.

The sworn testimony of Clarence L. Jordan and others discloses that the said Jordan nor any member, to his knowledge, pays any individual income tax, neither State nor Federal; Koinonia Farm Inc. has never paid any money to the Federal Government or State Government, as income tax or profit tax.

[*Publicity*]

After the reported violence said corporation began to give out news stories to the Associated Press and magazines throughout the United States, in which were printed many things that were untrue. Koinonia Farm Inc. also began writing, mimeographing and mailing out news letters to people all over the United States, which contained many untrue statements. The mailing list of Koinonia Farm Inc. produced before this grand jury by order of the Court, showed the names and addresses of approximately 1500 people.

Following the circulation of these untrue news stories in newspapers, magazines and the news letters mailed out by Koinonia Farm Inc., said corporation has received gifts and donations of over $27,500.00. It appears beyond question that gifts and donations to Koinonia Farm Inc. have increased tremendously since the initial report of violence and since the circulation of untrue statements in news letters, magazines and newspapers. It is logical to say that the tremendous increase in gifts and income flowing to Koinonia Farm Inc., has been induced by the circulation of this misleading and untrue printed matter.

[*Prompt Law Enforcement*]

We find that the Sheriff's office of Sumter County, Georgia and other law enforcement agencies have responded immediately to every call received from Koinonia Farm Inc., and have diligently investigated every reported act of violence. We deplore the fact that on many occasions officers and residents of Koinonia Farm Inc. saw fit to notify the Associated Press and other news agencies before they notified the local law enforcement officers.

Space will not permit in detail all specific incidents of violence but, for example, we cite two specific incidents which have been capitalized on by circulation through their news letters and releases to the press.

1. On the morning of March 5, 1957, after 8:30 A.M. Koinonia Farm Inc. telephoned to the Sheriff of Sumter County and advised him that someone had shot at its night watchman, John Eustice, twice about midnight, thereby knocking the light out of his hand. However, the incident was reported to the Associated Press and other newspapers within a few minutes after it occurred.

2. That on the morning of February 15, 1957, about 8:30 A.M., the Sheriff of Sumter County was notified by Koinonia Farm Inc., that three flood lights had been shot out about 1 A.M. with shotgun fire. This was also reported to the newspapers many hours before being reported to the Sheriff's office. On this particular occasion, the Sheriff immediately went out to investigate this matter, after being notified by Koinonia Farm Inc., and found that the three flood light bulbs had been replaced by someone at Koinonia Farm Inc., before he arrived and he received no cooperation whatsoever from anyone at Koinonia Farm Inc. in the investigation of this incident. No broken glass was found after searching the premises where said flood lights were supposed to have been broken.

[*Testimony Varied*]

We further find that in certain instances, after investigation by the Sheriff's office and G.B.I. agents, the physical facts do not coincide with the story as to how the incidents occurred as given by members of Koinonia Farm Inc. For example, as to the John Eustice shooting above referred to, it was impossible for a person or people to shoot straight at John Eustice and hit the flashlight claimed to have been held by John Eustice, with no shots striking John Eustice. Likewise, it is impossible for anyone to have shot straight toward John Eustice and hit the flashlight in a downward position and also in a crosswise position. John Eustice told the investigating officers that only two shots were fired. In fact, the physical evidence shows three pistol bullets were fired through the mirror of the car used at the time by John Eustice, from which he had temporarily alighted, and two shots were fired into the flashlight. The flashlight was sent to State Crime Laboratory and the report shows there were powder burns which indicated the blast had come from a gun at a very close range and, at the same time, the report showed that the damage done to the car mirror resulted from pistol bullets, possibly a 44 caliber.

It would have been physically impossible for the light to have been shot out of John Eustice's hand, in the position that John Eustice swore he was holding the light, without some of the shots hitting John Eustice, and it would have been further impossible for the bullets to have entered the flashlight at the range and direction from which they did enter. There was glass in the flashlight and the car mirror immediately before the shooting took place and John Eustice and the investigating law enforcement officers were unable to find any glass or fragments thereof at the scene where it was alleged to have happened.

John Eustice's sworn statement was that he was at least fifteen feet from the weapon that was fired upon him. It was well established that it would have been impossible to have evidence of powder burn from a weapon fifteen feet from John Eustice at the time it was fired. We conclude this was a framed and fixed act of violence on the part of Koinonia Farm Inc.

[*Burning of House*]

Much emphasis has been attached in the news letters and other publicity agencies in regard to the burning of a tenant house located about a half mile from the main quarters on the farm. The sheriff was phoned that a house was on fire and immediately proceeded thereto. No representative of Koinonia Farm Inc. showed up until the tenant house was completely destroyed by fire. The sheriff also returned to the scene of the burning tenant house for the second time on the same day and made further investigation. In spite of these efforts on the part of the Sheriff, Koinonia Farm Inc., in its news letters, announced to the world that the Sheriff was notified but never came. There is no evidence, either direct or circumstantial to indicate the fire which destroyed the tenant house was of incendiary origin.

This grand jury finds that the news letters produced to this body are in effect propaganda sheets and used for the purpose of soliciting donations and creating sympathy by the statements contained therein which were not true and, by innuendo and implication, to present a false picture as to these reported incidents of violence to the people throughout the United States. On the mailing list of Koinonia Farm Inc., consisting of so called friends and sympathizers, are the names of known Communists and Communistic organizations.

[*Damage to Market*]

We find that in reference to the destruction of the roadside market on U. S. #19 which oc-

curred on January 14, 1957, the only evidence of the placing of "dynamite" sticks comes from the evidence of Koinonia Farm Inc., and the only testimony as to dynamite being planted inside the building comes from the testimony of some members of Koinonia Farm Inc. From the sworn testimony of the law enforcement officers it is disclosed that on the night of the alleged destruction of the roadside market the last car seen on the premises was about dusk and was a station wagon belonging to Koinonia Farm Inc., which was backed up to the back door of said roadside market.

A few minutes before the actual alleged destruction of the roadside market a certain Packard sedan owned by Koinonia Farm Inc. was seen in the immediate vicinity of the roadside market on U. S. #19 going north towards the roadside market.

This grand jury from the standpoint of legal evidence cannot state what person or persons committed the violence but, if from the evidence before it, it had to make a decision, this grand jury would be persuaded that the evidence more strongly indicated that the violence is being committed by Koinonia Farm Inc., rather than anyone else.

The grand jury finds that upon submission of the news letters herein referred to, to certain members of Koinonia Farm Inc., they admitted the statements therein were not accurate and subject to misinterpretation by anyone who reads them without familiarity with all the facts. We condemn this practice.

A letter was presented to the grand jury under date of January 22, 1957 which Clarence L. Jordan wrote to the President of the United States. This letter stated among other things that the alleged acts of violence had been reported to the local enforcement officers of Americus, Sumter County, Georgia and that "nothing had been done." We find this to be a false statement.

[*Organization of Group*]

We find that many residents who sleep at Koinonia Farm Inc. at night were never awakened during any of these so called acts of violence and were entirely unfamiliar with them, although living on said premises and in some instances in the same house.

We find from the sworn testimony of some of the members of Koinonia Farm Inc., that it is a bi-racial group and membership consists of three stages. Full membership is had by being in the third and last stage. A member having reached the third stage controls the corporation and has charge of its assets and policies and there are only twelve full members now in residence, to-wit: Harry Atkinson, Allene Atkinson, Chris Drescher, Janet Drescher, Will Wittkamper, Marguerite Wittkamper, Clarence L. Jordan, Florence Jordan, Norman Long, Conrad Brown, Ora Brown and Iola Eustice.

It was sworn that no negro is now or ever has attained membership beyond the first or novice stage so that said negro or negroes could have no voice in the control of property or policies of said corporation.

[*Testimony on Communists*]

We further find that Koinonia Farm, Inc. has close friends among known Communists and have entertained known Communists who have visited the farm. Members of Koinonia Farm Inc. swore before this grand jury they would welcome Communists into their community and corporation. They further testified under oath it was their policy to accept or do business with any individual without any inquiry into the character of the individual or any concern as to his loyalty to the Government of the United States.

We further find it is the policy of the Communist Party operating in this country to form various front organizations with attractive corporate names with their policies directed and controlled by individuals of known fealty to the Communist Party. In instances where the motives and objectives of these corporations have been uncovered by security agents of the United States Government, their corporate names have been entered upon a list of subversives maintained by the Attorney General of the United States. When this occurs the Communists abandon the corporation as styled and proceed to organize a new corporation with another attractive name, with the same motives and objectives and controlled by the same personnel.

There was organized in the State of Louisiana a corporation under the name and style of Southern Conference for Human Welfare. This corporation was established to be Communistic and its name was entered upon the subversive list of the Attorney General. Immediately the Southern Conference for Human Welfare was

abandoned and some of the same individuals who had directed its affairs formed a new corporation under the name and style of Southern Conference Educational Fund, Inc.

Based upon hearings held in March, 1954, the report of a Subcommittee of the Committee on Judiciary of the United States Senate contains the following language: "The objective study of the entire record compels the conclusion that the Southern Conference Educational Fund, Inc. is operated with substantially the same leadership as its predecessor organization, the Southern Conference for Human Welfare. The sub-committee accordingly recommends that the Attorney General take the necessary steps to present this matter before the Subversive Activities Control Board, in order that a determination can be made as to the status of the Southern Conference Educational Fund, Inc."

[*Memberships Cited*]

It is highly significant that upon the list of the Board of Directors of Southern Conference Educational Fund, Inc. appears the name of Clarence L. Jordan, who for fourteen years has been the alter ego of Koinonia Farm Inc. Clarence L. Jordan under oath admitted that he was a Director in this corporation. This list of Directors, along with the name of Clarence L. Jordan, contains the name of Aubrey Williams, long identified in Communistic circles and others. Clarence L. Jordan swore that although a Director he did not know the aims and purposes of this corporation. A list of the officers and directors of Southern Conference Educational Fund, Inc. was read to Clarence L. Jordan name by name, and he swore he was not acquainted with any officer or director in said corporation and that no officer or director in the corporation knew him. The Grand Jury can not refrain from wondering how Clarence L. Jordan accepted a directorship in a corporation where none of the active personnel therein were known to him and where he was not apprised of the aims and purposes fostered by the corporation. It is even more difficult to understand why those responsible for the control of the corporation elected a man to membership on its Board of Directors whom they did not personally know.

The people of Sumter County will recall that last year Koinonia Farm Inc. proposed and intended to hold on its premises a bi-racial youth camp for boys and girls, and that the holding of such camp was enjoined by the Court. Thereupon, Koinonia Farm Inc. transferred the children who had registered to attend its camp to a camp to be held at Mont Eagle, Tennessee, located upon the properties of Highlander Folk School. We find that the operating head of Highlander Folk School, at Mont Eagle, Tennessee, has for long years been known to be a member of the Communist Party. His name is Miles Horton. He has visited at Koinonia Farm Inc. where his views must have been favorably received. Otherwise, the children would not have been transferred to an establishment under his supervision and control. We have received expert advice to the effect that this evidence is insufficient to convict of Communism in a Court of Law. However, we are pleased to leave to the good judgment and understanding of the people who read these Presentments the question of whether there exists extremely close kinship between the Communist Party and Koinonia Farm Inc.

The Grand Jury further finds from an investigation conducted on the premises by an official that he found the living conditions as to the residents living there to be deplorable and that some of the residents of the farm are living in abject poverty.

[*Religious Connections*]

We further find that, while Koinonia Farm Inc. claims to be a religious organization, they are in fact not affiliated with any religious group, church or organization and its only claimed religious gatherings are held on its own premises. Clarence L. Jordan and other members of Koinonia Farm Inc. were at one time accepted as members in a local Baptist Church but, on account of their general conduct and seeming desire to break up a substantial Church in this community, it was voted by the congregation unanimously that fellowship be withdrawn. It was withdrawn by said Baptist Church from them and their church letters have never been placed in any other church.

This Grand Jury finds that a certain resolution passed by the Americus & Sumter County Ministerial Association in reference to violence at Koinonia Farm Inc. has been circulated throughout the nation and that said letter has been sent to known Communists. Koinonia Farm Inc. has capitalized on this resolution in

its effort to secure donations, gifts and solicitations as will be hereinafter referred to.

We find that the Americus & Sumter County Ministerial Association has no by-laws and there is no required number to be present at a meeting to constitute a quorum to do business. We find on the occasion the resolution was passed, that the pastor of the First Methodist Church, Americus; the pastor of the First Baptist Church, Americus and the pastor of the Central Baptist Church, Americus, as well as many other ministers of leading churches in Sumter County were not present and did not vote on this resolution; nor do we think the resolution expresses the majority opinion of members of the association, as to endorsement of the practices of Koinonia Farm Inc. However, we do commend and concur with the Association in being opposed to violence at all times.

We further find that on occasions prospective members have been subjected to hours of questioning and persuasion in an effort to get said prospective member or members to give and deed all of their earthly and material possessions to the corporation. The manner in which these people are questioned amounts to severe mental strain and punishment and is an inhumane method used by Koinonia Farm Inc. in obtaining property.

[*Damage Sustained*]

We further find that the only substantial damage to the corporation was the destruction of the roadside market. It has settled with one insurance company but now has a claim in the hands of its attorneys who are negotiating final settlement with another insurance company. The loss could not have been over $7,000.00 but, as a result, exclusive of what it will receive from insurance companies, the corporation has profited by many thousand dollars.

IN THE LIGHT OF THE ABOVE FACTS AND OTHER FACTS DISCLOSED TO THIS GRAND JURY, WE ARE IMPELLED TO SUBMIT TO THE PUBLIC THE FOLLOWING UNANIMOUS CONCLUSIONS BASED UPON SAID FACTS:

(a) We find that the only person or persons who have profited by the reported violence at Koinonia Farm Inc., is Koinonia Farm Inc., and the weight of evidence strongly indicates the alleged acts of violence are coming from within the farm itself, as we have been unable to connect in any way any outside person with any of said alleged acts. The acts of reported violence have been greatly exaggerated and used as propaganda for public consumption circulated through its questionable mailing list and other press agencies, for its own pecuniary gain and profit.

(b) We find Koinonia Farm Inc., while purporting to be a religious organization, is in fact a corporation which prefers to use the name Koinonia community (or Koinonia Farm) in its dealing with the outside public. It has no affiliation with any church or religious group of any nature and while they are chartered as a Christian organization, we find its claim to Christianity is sheer window dressing and its practice of Christianity has no precedent in the religious annals of the United States. The manner in which Clarence L. Jordan testified before this Grand Jury under oath, his failure to answer questions, his complete lack of cooperation, his general resentment and attitude toward this inquiry, the utter improbability of the truth of some of his sworn testimony and the contradictions between his sworn testimony and the sworn testimony of other members of Koinonia Farm Inc. render doubtful his honesty, integrity and good faith. Likewise, we have had to discard as untrue some testimony he gave to this grand jury under oath, as we could not believe it.

(c) We find from an investigation of its financial status that Koinonia Farm Inc. and its members do not pay any individual or corporation income tax to the Federal or State Governments. The sworn testimony discloses that the corporation does business with only two banks, to-wit Citizens Trust Company, Atlanta, Georgia and Citizens Bank of Americus. The corporation's records show $1600.92 in the Citizens Trust Company, Atlanta, Georgia and only a very small checking account in the Citizens Bank of Americus.

We further find the records of Koinonia Farm Inc. show a profit of over $11,000.00 made in 1956; before the reported violence began Koinonia Farm Inc.'d roadside market was doing a yearly business of approximately $7,000.00 and after said reported violence started its monthly sales and mail orders from said roadside market increased to over $7,000.00 PER MONTH. This shows an increase of TWELVE TIMES its business prior to the alleged acts of violence. We

find the provision in the charter which designates it as a religious organization and the provision in its charter which designates it as a non-profit corporation are equally misleading, false and fraudulent and, under the shelter of a charter designating it as a non-profit corporation, certain individuals are amassing to themselves enormous profits.

(d) We further find from the records of Koinonia Farm Inc. that since the acts of reported violence began, which was in July 1956, Koinonia Farm Inc. has received over $14,500.00 in gifts during the remainder of the year 1956. We further find from the records of Koinonia Farm Inc. that said corporation has received since January 1, 1957 to March 26, 1957 the sum of $12,938.27 as gifts and donations which is in addition to the income of the farm and mail order business. There is great disparity between the amounts of money known to have come into the corporation and the amounts of money reflected in the two bank balances.

(e) It appears that the only substantial damage inflicted upon Koinonia Farm Inc. amounted to approximately $7,000.00. Said corporation has received some money from an insurance company and has a further claim which has been placed in the hands of said corporation's attorney for collection. If Koinonia Farm Inc. is unable to collect this claim, said corporation has still made a profit as a result of said reported violence of over $20,000.00 in gifts alone. Koinonia Farm Inc. has received the sum of $27,516.98 in gifts and donations since the reported acts of violence began. Of course this Grand Jury has no way of knowing whether said amount of $27,516.98 constitutes all of the money that said corporation has received as gifts and donations but said corporation's own records show said amount.

(f) We feel that the Americus & Sumter County Ministerial Association should be mildly rebuked for taking ill-considered action which did reflect discredit upon our county and its people, without making sufficient effort to ascertain the facts and without bringing more deliberation to bear upon the results of such hasty action. We believe it fair to state that neither the pastor of the First Methodist Church of Americus, the pastor of the First Baptist Church of Americus, nor the pastor of the Central Baptist Church of Americus participated in this action, and that many ministers throughout the county were not present; and certainly they are expressly excluded from any criticism herein. This grand jury believes that the people of this county are entitled to expect the sincere cooperation and helpfulness of those gentlemen who constitute the personnel of the Ministerial Association. If they are going to live with us they should work with us and, if they can't do us good, they should strive not to do us harm.

(g) The corporation has proclaimed to the nation its enviable pattern of Christian brotherhood maintained in perfect consistency with the concept of racial integration. However, this grand jury finds that the atmosphere prevailing there is not nearly so conducive to the well-being of members of the negro race as the corporation would want those hostile to the southern way of life to believe. We find the policies of the corporation are promulgated by those individuals who have reached the third and highest stage of membership. No Negro has reached this stage during the entire fourteen years of its corporate existence. There are three stages of membership, to-wit: the novice, the provisional stage and the full membership stage. To this date no negro has gotten beyond the first stage. This Grand Jury had before it one of the negro members of the organization. Since his residency at Koinonia Farm Inc. his duties have been those of a farm laborer in the fields. He draws absolutely no compensation in money for his labor. He testified that since he had been there he has actually received one pair of work pants and one pair of shoes. It is apparent to the grand jury that those negroes who have united themselves with the corporation and its functions in an effort to achieve for themselves bi-racial christian brotherhood have rather relegated themselves into a status of brain washed peonage, while those few members of the white race higher up in official personnel enrich themselves at the expense of the negro's toil.

(h) We deplore immeasurably the fact that there has been established within the boundaries of our good county a haven for conscientious objectors, some of whom have served terms in the Federal penitentiary for their refusal to register under the draft law. It is paradoxical indeed that men who use every device and contrivance open to them to escape the payment of taxes, and who readily say under oath they would not take up arms in defense of the United States, can claim the right so forcibly to have

their constitutional rights strictly protected and safeguarded; and who have no hesitancy in writing to the President of the United States to demand that good and loyal American citizens of Sumter County Georgia be held to strict accountability for the rights of those on whose patriotism our country cannot rely under a constitution to which they themselves are not loyal and have sworn never to take up arms to defend. It is a haven under the sworn testimony where any known Communist in the United States is a welcome guest. They do not hesitate to swear they would have no objection to any business dealings with a known Communist or group of Communists. We do not hesitate to say there is a strong filial connection between Koinonia Farm Inc. and the Communist Party and the evidence points strongly to the conclusion that they themselves may be actual members thereof.

(i) We the Grand Jury conclude that the reported violence at Koinonia Farm Inc. can and will be stopped when Koinonia Farm Inc. sees fit to stop such violence.

We wish to thank the Board of Commissioners of Roads & Revenue of Sumter County for their full cooperation and support in this investigation.

We would like to express our appreciation to the Honorable Cleveland Rees, Judge of the Superior Court of the Southwestern Circuit for his assistance and patience in this lengthy investigation.

We would like to especially thank our able Solicitor General, the Honorable Charles Burgamy for his faithful, diligent and thorough preparation in disclosing facts to this Grand Jury and for the efficient manner in which he procured records and other physical evidence which has proved most helpful to this Grand Jury in its investigation of this matter.

We also wish to express our appreciation to the County Attorney, Hollis Fort, Jr., for his able assistance and for the manner in which he worked and cooperated with this body and our Solicitor General.

We highly commend the efficient manner in which the Sheriff of Sumter County has investigated every reported act of violence in reference to this matter and also the members of the Georgia Bureau of Investigation for their full cooperation in this matter.

We recommend that a copy of these Presentments be published in the Americus Times-Recorder at the legal rate; that a copy be sent to Hon. Richard B. Russell, United States Senator, Hon. Herman E. Talmadge, United States Senator and to the Hon. E. L. Forrester, Congressman from the Third Congressional District of Georgia; and to the Hon. Marvin Griffin, Governor of the State of Georgia and to the Hon. Eugene Cook, Attorney General of the State of Georgia. We further recommend that a copy of these Presentments be sent to Hon. Herbert Brownell, Jr., Attorney General of the United States.

We recommend the payment of $35.00 for services rendered for clerical work and the typing of these Presentments.

This the 5th day of April, 1957.

Respectfully Submitted
/s/ F. L. Butler, Sr.
FOREMAN

/s/ Tommy Hooks III
CLERK

GEORGIA—Sumter County:

The within Presentments are hereby received, ordered filed and published as requested.

This the 5th day of April, 1957.

/s/ Cleveland Rees

JUDGE OF THE SUPERIOR COURTS
SOUTHWESTERN JUDICIAL CIRCUIT

REAL PROPERTY
Descent and Distribution—Tennessee

See the case of *Evans v. Young* at p. 658.

DEFAMATION
Libel—Illinois

Joseph BEAUHARNAIS v. The PITTSBURGH COURIER PUBLISHING COMPANY, Inc.

United States Court of Appeals, Seventh Circuit, April 19, 1957, No. 11670.

SUMMARY: The plaintiff filed an action in federal district court in Illinois under diversity of citizenship jurisdiction against the publishing company. The plaintiff sought damages of one million dollars based on an alleged libelous article published by the defendant in January, 1952. The article concerned the activities of the plaintiff in the "White Circle League of America" and charged that his actions created and promoted racial discord and hatred. The publishing company defended on the grounds of lack of malice and the truth of the matter published. The district court directed a verdict for the publishing company and the plaintiff appealed. The Court of Appeals, Seventh Circuit, affirmed, holding that the publication was fair comment and was published without malice.

Before DUFFY, Chief Judge, and FINNEGAN and SWAIM, Circuit Judges.

DUFFY, Chief Judge.

Plaintiff's complaint herein sought damages from defendant for publishing alleged libelous matter in the January 5, 1952 issue of its newspaper, The Pittsburgh Courier. Defendant is a Pennsylvania corporation, and plaintiff a resident of Illinois. Jurisdiction was based upon diversity of citizenship. The record indicates defendant's newspaper is circulated principally among members of the colored race.

Defendant published in its January 5, 1952 issue an article with a large headline "What's Behind the Cicero Riot?" Plaintiff's photograph appeared as part of the background for the headline. Also, as part of said background, was reproduced a circular or pamphlet with the heading "The White Circle League of America", which listed plaintiff as the founder. The circular was worded as follows:

"THE WHITE CIRCLE LEAGUE
OF AMERICA
Founder—Joseph Beauharnais
P. O. Box 531—Chicago 90, Illinois

Dedicated to protect and maintain the Dignity, Social Edicts, Customs and Rights of the White Race in America.

WANTED

ONE MILLION SELF RESPECTING WHITE PEOPLE IN CHICAGO TO UNITE UNDER THE BANNER OF THE WHITE CIRCLE LEAGUE OF AMERICA to oppose the National Campaign now on and supported by TRUMAN'S INFAMOUS CIVIL RIGHTS PROGRAM and some Church Organizations to amalgamate the black and white races with the object of mongrelizing the white race!

THE WHITE CIRCLE LEAGUE OF AMERICA is the only articulate white voice in America being raised in protest against negro aggressions and infiltrations into all white neighborhoods. The white people of Chicago MUST take advantage of this opportunity to become UNITED. If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions * * * * rapes, robberies, knives, gun and marijuana of the negro, SURELY WILL.

The Negro has many national organizations working to push him into the midst of the white people on many fronts. The white race does not have a single organization to work on a NATIONAL SCALE to make it's wishes articulate and to assert its natural rights to self-preservation. THE WHITE CIRCLE LEAGUE OF AMERICA proposes to do the job.

I wish to be enrolled as a member in THE WHITE CIRCLE LEAGUE OF AMERICA, and I will do my best to secure ten or more members.

Phone.

My name is..... Address....."

After ten spaces for signatures and addresses, the circular concluded with:

"We must awake and protect our white families and neighborhoods before it is too

late. Let us work unceasingly to conserve the white man's dignity and rights in America.

Joseph Beauharnais."

The words of the article of which plaintiff complained and set forth in his complaint are: "There is a sinister character in Chicago who is more dangerous than the nation's worst gangster. He conducts a vicious and risky business—the promotion of racial hatred, with biased whites as his steady clients. He has never engineered, as far as I know, any outrage like the Valentine Day massacre, but his atrocious activities, if permitted to continue, are sure to cause violent death to hundreds of unsuspecting American citizens who become victims of his bias plots * * * He defies all law and order in the performance of his defaming work. He is a menace to racial harmony in Chicago. This is the introduction to Joseph Beauharnais * * *." "Beauharnais, tall, loose-jointed, shifty-eyed, was dressed in a shoddy blue suit with red and white stripes, probably in answer to his 'patriotic' tendencies."

[*Damages Claimed*]

As to damages, plaintiff averred in each Counts 1 and 2 "That by reason of the premises plaintiff has been damaged in the sum of One Million Dollars, for which he prays judgment." As to Count 3, Plaintiff alleged "By reason whereof the plaintiff has been damaged in his standing and reputation, and in his business and social relations, in the community in which he lives and elsewhere, in the sum of One Million Dollars, for which he prays judgment."

The original complaint was filed by plaintiff *pro se*, but an amendment to the complaint showing diversity of citizenship, was signed by plaintiff and by his attorney, Lawrence M. Fine.

Defendant's answer, among other things, averred the article declared on was published as a news item pertaining to plaintiff's activities as the founder of The White Circle League, and his actions creating and promoting racial discord and hatred. In substance, the answer alleged that the article was fair comment, and that it was written and published without malice. The answer denied that the statements therein were false and untrue and asserted that the article was published in good faith.

The trial in the District Court was before a jury. Defendant moved for a directed verdict at the close of plaintiff's evidence. The District Court granted the motion, whereupon the jury returned verdict in favor of the defendant. Judgment was entered accordingly from which this appeal was taken.

[*Illinois Law Controls*]

The law of Illinois is controlling. Spanel v. Pegler, 7 Cir., 160 F.2d 619, 621; Rose v. Indianapolis Newspapers, 7 Cir., 213 F.2d 227, 229. Article 2, § 4 of the Constitution of Illinois provides:

"FREEDOM OF SPEECH AND PRESS—LIBEL. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives and justifiable ends. shall be a sufficent defense."

Illinois has a statutory definition of libel. Smith-Hurd Anno. Stats., Chap. 38, § 40, provides: "A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury."

Although plaintiff complains of a relatively small part of the article published by defendant, he introduced the entire article in evidence. The words in the article must be construed according to the natural and obvious meaning of the words used, taking into consideration the article as a whole including the headlines. Cook v. East Shore Newspapers, 327 Ill. App. 559, 64 N.E. 2d 751, 764; Gogerty v. Covins, 5 Ill. App. 2d 74, 124 N.E. 2d 602, 605; Kulesza v. Chicago Daily News, 311 Ill. App. 117, 35 N.E. 2d 517, 521; Brewer v. Hearst Publishing Co., 7 Cir., 185 F.2d 846, 850; Sehy v. Hearst Publishing Co., 7 Cir., 205 F.2d 750, 752; Rose v. Indianapolis Newspapers, 7 Cir., 213 F.2d 227, 229.

[*Truth Shown*]

The article contains a review of the plaintiff's career commencing more than two years prior to January 5, 1952 (the date of publication) as the president and active head of "The White Circle League of America," directing and spread-

ing hatred against the negro race. As the article points out, the plaintiff, during that period, was convicted in the Municipal Court of Cook County for violation of Illinois Revised Statutes, 1949, Chap. 38, § 471. The statute, as relevant, provides: "It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots * * *." His conviction was affirmed on January 18, 1951 by the Supreme Court of Illinois, People v. Beauharnais, 408 Ill. 512, 97 N.E. 2d 343, and was also affirmed by the United States Supreme Court on April 28, 1952, Beauharnais v. Illinois, 343 U.S. 250.

The article here in question did not call plaintiff a gangster. It did state that he was a sinster character who was more dangerous than the nation's worst gangster because he conducts the vicious and risky business of the promotion of racial hatred. The article ventured the opinion that if plaintiff's activities continued, violent death might come to hundreds of unsuspecting Americans.

It is the law of Illinois that: "* * * the subject matter of the article constituted matter of public interest and concern, which under the current weight of authority is legitimate subject of criticism and comments by a newspaper, so long as it does so fairly and with an honest purpose. 'Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously.' * * *." Kulesza v. Chicago Daily News, 311 Ill. App. 117, 35 N.E. 2d 517, 520.

The subject matter of the Cicero riots was a matter of great public interest and concern. The press of the entire nation had given much publicity to the unfortunate occurrence. The record shows that during the violence of the Cicero riots the plaintiff was on the scene soliciting memberships for The White Circle League. Plaintiff's activities were a legitimate subject of fair criticism and comment. Criticisms directed to such a subject matter are not libelous, although severe in terms, unless they were written and published maliciously. Brewer v. Hearst Publishing Co., 7 Cir., (Ill.) 185 F.2d 846, 850; Kulesza v. Chicago Daily News, 311 Ill. App. 117, 35 N.E. 2d 517, 521; Tiernan v. East Shore Newspapers, 1 Ill. App. 2d 150, 116 N.E. 2d 896, 898.

[*Scope of Fair Comment*]

Although the criticism of the plaintiff's activities was couched in strong language, the attitude taken by the Courts where the subject matter is of great public concern may be shown by a quotation from the opinion of the Supreme Judicial Court of Massachusetts in Hartman v. Boston Herald-Traveler Corporation, 323 Mass. 56, 80 N.E. 2d 16, 19, where the court said: "Fair comment (on a matter of public concern) may be severe and may include ridicule, sarcasm, and invective. * * * But severity and vigor in expression, whatever evidential effect they may have, are not to be confused with malice in motive."

The question whether the words complained of are libelous *per se* was for the trial court to determine. Kulesza v. Chicago Daily News, 311 Ill. App. 117, 35 N.E. 2d 517, 521. Construing the article according to its plain and ordinary meaning and considering the article as a whole, we are of the opinion that it did not exceed the limits of fair comment permitted in a matter of great public interest.

Judgment.

AFFIRMED

LEGISLATURES

EDUCATION
Public Schools—Texas

House Bill No. 231 of the 1957 session of the Texas Legislature, which was enacted and approved by the Governor on May 23, 1957, provides for the administration of pupil placement and transfer in the public schools. Under this "Pupil Placement Act" local school boards are given authority to assign pupils to schools on the basis of a number of standards set out in the act. Appeals from and a limited court review of the decisions of the boards are provided. The act also requires that no child will, on objection of his parent or guardian, be compelled to attend a school at which the races are mixed.

AN ACT to declare the public policy of the State of Texas with respect to public education; to provide for further study and analysis as a basis for general reconsideration of the efficiency of the system in promoting the progress of pupils in accordance with their aptitudes and in furtherance of social order and goodwill; pending such reconsideration to authorize district and county Boards of School Trustees to provide for the continuation or establishment of units, facilities and curricula and the placement of pupils therein so as to assure the best practical educational curriculum and environment for the individual pupils consistent with the educational progress of others and the paramount function of the State's police power to assure social order, good will and the public welfare; to establish the right of parents or guardians to withdraw children from public schools under certain conditions; to provide for appeals from the decisions of such Boards in certain cases; providing that nothing in this Act shall affect any action heretofore taken by any school district in this State covering the subject matter of this Act; and declaring an emergency.

Be it enacted by the legislature of the state of Texas:

Section 1. The Legislature finds and declares that the rapidly increasing demands upon the public economy for the continuance of education as a public function and the efficient maintenance and public support of the public school system require, among other things, consideration of a more flexible and selective procedure for the establishment of units, facilities and curricula and as to the qualification and assignment of pupils.

The Legislature also recognizes the necessity for a procedure for the analysis of the qualifications, motivations, aptitudes and characteristics of the individual pupils for the purpose of placement, both as a function of efficiency in the educational process and to assure the maintenance of order and good will indispensable to the willingness of its citizens and taxpayers to continue an educational system as a public function, and also as a vital function of the sovereignty and police power of the State.

Section 2. To the ends aforesaid, the State Board of Education shall make continuing studies as a basis for general reconsideration of the efficiency of the educational system in promoting the progress of pupils in accordance with their capacity and to adapt the curriculum to such capacity and otherwise conform the system of public education to social order and good will. Pending further studies and recommendations by the school authorities the Legislature considers that any general or arbitrary reallocation of pupils heretofore entered in the public school system according to any rigid rule of proximity of residence or in accordance solely with request on behalf of the pupil would be disruptive to orderly administration, tend to invite or induce disorganization and impose an excessive burden on the available resources and teaching and administrative personnel of the schools.

Section 3. Pending further studies and legis-

lation to give effect to the policy declared by this Act, the respective district and county Boards of School Trustees hereinafter referred to as "Local Boards," are not required to make any general reallocation of pupils heretofore entered in the public school system and shall have no authority to make or administer any general or blanket order to that end from any source whatever, or to give effect to any order which shall purport to or in effect require transfer or initial or subsequent placement of any individual or group in any unit or facility without a finding by the Local Board or authority designated by it that such transfer or placement is as to each individual pupil consistent with the test of the public and educational policy governing the admission and placement of pupils in the public school system prescribed by this Act.

Section 4. Subject to appeal in the respect herein provided, each Local Board of School Trustees shall have full and final authority and responsibility for the assignment, transfer and continuance of all pupils among and within the public schools within its jurisdiction, and may prescribe rules and regulations pertaining to those functions. Subject to review by the Board as provided herein, the Board may exercise this responsibility directly or may delegate its authority to the Superintendent or other person or persons employed by the Board. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic program; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

In considering the factors and the effect or results thereof the Board or its agents shall not consider and shall not use as an element of its evaluation any matter relating to the national origin of the pupil or the pupil's ancestral language.

Local Boards may require the assignment of pupils to any or all schools within their jurisdiction on the basis of sex, but assignments of pupils of the same sex among schools reserved for that sex shall be made in the light of the other factors herein set forth.

Section 5. Local Boards may, by mutual agreement, provide for the admission to any school of pupils residing in adjoining districts whether in the same or different counties, and for transfer of school funds or other payments by one Board to another for or on account of such attendance.

Section 6. Subject to the provisions of law governing the tenure of teachers, Local Boards shall have authority to assign and reassign or transfer all teachers in schools within their jurisdiction.

Section 7. A parent or guardian of a pupil may file in writing with the Local Board objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the Board. Unless a hearing is requested, the Board shall act upon the same within thirty (30) days, stating its conclusion. If a hearing is requested the same shall be held beginning within thirty (30) days from receipt by the Board of the objection or petition, at a time and place within the school district designated by the Board.

The Board must conduct such hearing and such hearing shall be final on behalf of the Board.

In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the Board shall be authorized to conduct investigations as to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of such investigations and examinations.

Section 8. Any other provisions of law notwithstanding, no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the Board, if such be the decision of the Local Board. If in connection therewith a requested assignment or transfer is refused by the Board, the parent or guardian may notify the Board in writing that he is unwilling for the pupil to remain in the school to which assigned, and the assignment and further attendance of the pupil shall thereupon terminate; and such child shall be entitled to such aid for education as may be authorized by law.

Section 9. The action of the Board shall be final except that in the event that the pupil or the parent or guardian, if any, of any minor or, if none, of the custodian of any such minor shall, as next friend, file exception before such Board to the final action of the Board as constituting a denial of any right of such minor guaranteed under the Constitution of the United States, and the Board shall not, within fifteen (15) days reconsider its final action, an appeal may be taken from the final action of the Board, on that ground alone, to the District Court of the county in which the School Board is located by filing with the Clerk within thirty (30) days from the date of the Board's final decision a petition stating the facts relevant to such pupil as bearing on the alleged denial of his rights under the Constitution, accompanied by bond with sureties approved by the Clerk, conditioned to pay all costs of appeal if the same shall not be sustained.

Section 9A. Nothing in this Act shall affect any action heretofore taken by any school district in this State covering the subject matter of this Act.

Section 10. The provisions of this Act are severable, and if any section or provision of this Act shall be held to be in violation of the Constitution of Texas or of the United States, such decision shall not affect the validity or enforceability of the remainder of this Act.

Section 11. The fact that the State is in urgent need of adequate public school assignment procedure and provisions creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and this Rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

EDUCATION
Public Schools—Texas

House Bill No. 65 of the 1957 session of the Texas Legislature, which was enacted and approved by the Governor on May 23, 1957, provides for local option elections within the several school districts as to whether a dual, i.e., racially segregated, school system will be operated in the district. The act also provides for criminal penalties to be imposed upon school authorities who violate its provisions.

AN ACT to provide local option elections to determine continuance or abolition of a dual school system in each public school district in the State of Texas; requiring continuance of such dual school system until abolishment thereof be authorized by prior vote of the qualified electors in a school district; providing that a dual system may be maintained by arrangements for transfer and the educating of children in other public school districts; and declaring an emergency.

Be it enacted by the legislature of the state of Texas:

Section 1. That no board of trustees nor any other school authority shall have the right to abolish the dual public school system nor to abolish arrangements for transfer out of the district for students of any minority race, unless by a prior vote of the qualified electors residing in such district the dual school system therein is abolished.

Section 2. An election for such purposes shall be called only upon a petition signed by at least twenty per cent (20%) of the qualified electors residing in such district. Such petition shall be presented to such office or board now authorized to call school elections. Such an election may be set for the same date as the school trustee election in that district, if such petition is filed within ninety (90) days to such date, otherwise the official or board shall call such an election within sixty (60) days after filing of such petition. The election shall be conducted in a manner similar to that for the election of school trustees. No subsequent election on such issues shall be called within two (2) years of a prior election held hereunder.

Section 3. School districts which maintained integrated schools for the 1956-1957 school year shall be permitted to continue doing so hereafter unless such system is abolished in accordance with the provisions of this Act. No student shall be denied transfer from one school to another because of race or color.

Section 4. Any school district wherein the board of trustees shall violate any of the above provisions shall be ineligible for accreditation and ineligible to receive any Foundation Program Funds during the period of time of such violation. Any person who violates any provision hereof shall be guilty of a misdemeanor and shall be fined not less than One Hundred Dollars ($100) nor more than One Thousand Dollars ($1,000).

Section 5. The fact that there is no adequate provision in law for local option elections in public school districts to determine whether to maintain or abolish a dual school system creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and this Rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

PUBLIC ACCOMMODATIONS
Anti-discrimination Laws—United Kingdom [Proposed]

A bill (No. 30, 5 Eliz.2) designed to prohibit discrimination on grounds of race, color or religion in inns, restaurants and other places of public accommodation has been introduced in the Parliament by Mr. Fenner Brockway, a Conservative Party member. Information has been obtained that similar proposed legislation is also to be sponsored by members of the Labour Party. The bill, as introduced, follows:

A BILL TO make illegal discrimination to the detriment of any person on the grounds of colour, race and religion in the United Kingdom.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. For the purpose of this Act, a person exercises discrimination where he refuses, withholds from or denies to any other person facilities or advantages on the ground of the colour, race or religion of that other person.

2. No person shall be entitled to exercise racial discrimination in pursuance of any of the following occupations:

(*a*) Innkeeper.
(*b*) Keeper of a common lodging house.
(*c*) Keeper of a restaurant, café or other place kept or used for the sale of food or drink to the public.
(*d*) Keeper of any place kept or used for

public dancing, singing, music or any public entertainment of the like kind.

3. Any covenant or provision in any lease or agreement for or in consideration of or collateral to a lease (whether made before or after the passing of this Act) forbidding or tending to forbid the use or occupation of any premises on any such ground as aforesaid shall be void.

4. No person who employs fifty or more persons in any industry, trade or business shall be entitled on any such ground as aforesaid to refuse to employ or to promote or to terminate the employment or promotion of any person, and no persons shall be entitled on any such ground to act in consort to refuse to consent to such employment or promotion or to terminate the same.

5. No person shall be entitled on any such grounds as aforesaid to employ any person at less than the standard rate of wages and conditions for his grade of work.

6. Any person who commits a breach of this Act shall be guilty of an offence punishable, in the case of the first offence, to a fine not exceeding five pounds, and, in the case of a subsequent conviction, to a fine not exceeding twenty-five pounds, and any person who suffers damages in consequence of such action shall be entitled to recover against him damages in a civil action.

7. Any person who commits a breach of this Act in the course of conducting an activity for which any licence or registration is required may be refused a renewal of or deprived of his licence or registration by the licencing or registration authority.

8. This Act may be cited as the Racial Discrimination Act, 1956.

PUBLIC ACCOMMODATIONS
Hospitals—Illinois

Section 137-13.1 of the Chicago, Illinois, Municipal Code, adopted as an ordinance on March 14, 1956, forbids discrimination on the basis of race, color, religion or ancestry in admittance to or treatment in any hospital in the city. That ordinance follows:

"No hospital, nor any person acting as superintendent or manager, or who is otherwise in charge or control of any hospital, nor any person connected with or rendering service in any hospital in any capacity whatsoever, nor any agent or employee thereof shall deny to any person admission for care or treatment, equality of care or treatment in a hospital, or the use of any of the hospital facilities and services relating to care or treatment of such person, on account of race, color, creed, national origin or ancestry, provided that a member of the medical staff of said hospital or an authorized physician designated to act for him may examine such person and determine the need of such person for medical care or treatment."

EMPLOYMENT
Fair Employment Laws—Colorado

Senate Bill No. 126 of the 1957 Colorado legislature, as enacted and approved by the Governor on March 13, 1957, amends, in effect, the Colorado Anti-discrimination Act of 1951 relating to discrimination in employment. Under the 1957 act discrimination in employment

practices on the basis of race, color, creed, national origin or ancestry is prohibited. Investigatory and enforcement procedures are provided through an Anti-discrimination Division and Commission and through court action.

Senate Bill No. 126.—A bill for an act concerning Discrimination in Employment and to repeal Article 19, Chapter 81, Colorado Revised Statutes 1953, as amended.

Be It Enacted by the General Assembly of the State of Colorado:

SECTION 1. *Short Title*—This Act may be known and may be cited as the Colorado Anti-Discrimination Act of 1957.

SECTION 2. *Definitions*—As used in this Act:

(1) "Court" shall mean the district court in and for the judicial district of the state of Colorado in which the asserted unfair employment practice occurred, or if said court be not in session at that time, then any judge of said court.

(2) "Person" shall mean one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, the state of Colorado and all political subdivisions and agencies thereof.

(3) "Employment agency" shall mean any person undertaking to procure employees or opportunities to work for any other person, or the holding itself out to be equipped to do so.

(4) "Labor organization" shall mean any organization which exists for the purpose in whole or in part of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employment.

(5) "Employer" shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state; but it does not mean religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing.

(6) "Employee" shall mean any person employed by an employer, save and except a person in the domestic service of any person.

(7) "Unfair employment practice" shall mean those practices specified as discriminatory or unfair in section 5 hereof.

(8) "Commission" shall mean the Colorado anti-discrimination commission, created by this act, and the term "commissioner" shall mean a member of that commission.

(9) "Coordinator" shall mean the coordinator of fair employment practices, which office is created by this act.

SECTION 3. *Anti-discrimination division*—There is hereby created a division of State Government to be known and designated as the Colorado anti-discrimination division, which said division shall be under the jurisdiction and direction of the Colorado anti-discrimination commission. The division shall have as its immediate supervisory head a coordinator of fair employment practices. Such coordinator shall be appointed by the governor pursuant to article XII, section 13 of the constitution. Any coordinator so appointed shall at all times be under the direct supervision and control of the Colorado anti-discrimination commission.

SECTION 4. *Anti-discrimination commission*—The Colorado anti-discrimination commission shall consist of seven members, who shall be appointed by the governor, with the advice and approval of the senate, for terms of four years, except that of the first members appointed, two shall be appointed for terms of two years and two shall be appointed for terms of three years. Appointments shall be made to provide geographical area representation insofar as may be practicable, and no more than four members shall belong to the same political party. Vacancies shall be filled by the governor by appointment with the advice and approval of the senate, and the term of a commissioner so appointed shall be for the unexpired part of the term for which he is appointed. Any commissioner may be removed from office by the governor for cause. Commissioners shall serve without compensation, but shall be reimbursed for necessary travel expenses incurred by them while on official commission business. The commission may adopt, amend or rescind rules for governing its meetings, and four commissioners shall constitute a quorum.

The Colorado anti-discrimination commission shall have the following powers and duties:

(1) To appoint such investigators and other employees and agents, pursuant to article XII, section 13 of the constitution, as it may deem

necessary for the enforcement of this act, and to prescribe their duties.

(2) To adopt, publish, amend and rescind regulations consistent with and for the enforcement of this act.

(3) To receive, investigate and pass upon complaints alleging discrimination in employment or the existence of a discriminatory or unfair employment practice by a person, an employer, an employment agency, a labor organization, or the employees or members thereof.

(4) To investigate and study the existence, character, causes and extent of discrimination in employment in this state by employers, employment agencies and labor organizations, and to formulate plans for the elimination thereof by educational or other means.

(5) To hold hearings upon any complaint made against a person, an employer, an employment agency, a labor organization, or the employees or members thereof, to subpoena witnesses and compel their attendance, to administer oaths and take the testimony of any person under oath, and to compel such employer, employment agency, labor organization, official or other person to produce for examination any books and papers relating to any matter involved in such complaint. Such hearings may be held by the commission itself, or by any commissioner, or by the co-ordinator, or by any hearing examiner appointed by the commission. If a witness either fails or refuses to obey a subpoena issued by the commission, the commission may petition the District Court having jurisdiction for issuance of a subpoena in the premises and the Court shall in a proper case issue its subpoena; refusal to obey such subpoena shall be punishable by contempt. No person shall be excused from attending and testifying or from producing records, correspondence, documents or other evidence in obedience to a subpoena in any such matter, on the ground that the evidence or the testimony required of him may tend to incriminate him or subject him to any penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he shall be compelled to testify or produce evidence after having claimed his privilege against self-incrimination, except that such person so testifying shall not be exempted from prosecution and punishment for perjury committed in so testifying.

(6) To issue such publications and reports of investigations and research as in its judgment will tend to promote good will among the various racial, religious and ethnic groups of the state, and which will tend to minimize or eliminate discrimination in employment because of race, creed, color, national origin or ancestry.

(7) To prepare and transmit to the governor and to the general assembly from time to time, but not less often than once each year, reports describing its proceedings, investigations, hearings it has conducted and the outcome thereof, decisions it has rendered, and the other work performed by it.

(8) To recommend policies to the governor and to submit recommendations to employers, employment agencies and labor organizations to effectuate such policies.

(9) To make recommendations to the general assembly for such further legislation concerning discrimination because of race, creed, color, national origin or ancestry as it may deem necessary and desirable.

(10) To cooperate, within the limits of any appropriations made for its operation, with other agencies or organizations, both public and private, whose purposes are consistent with those of this act, in the planning and conducting of educational programs designed to eliminate racial, religious, cultural and intergroup tensions.

(11) To adopt an official seal.

SECTION 5. *Discriminatory and Unfair employment practices*—It shall be a discriminatory or unfair employment practice:

(1) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry.

(2) For an employment agency to refuse to list and properly classify for employment or to refer an individual for employment in a known available job for which such individual is otherwise qualified, because of race, creed, color, national origin or ancestry; or to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on account of race, creed, color, national origin or ancestry.

(3) For a labor organization to exclude any individual otherwise qualified from full membership rights in such labor organization, or to expel any such individual from membership in

such labor organization, or to otherwise discriminate against any of its members in the full enjoyment of work opportunity, because of race, creed, color, national origin or ancestry.

(4) For any employer, employment agency or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or membership, or to make any inquiry in connection with prospective employment or membership which expresses, either directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin or ancestry, or intent to make any such limitation, specification or discrimination; unless based upon a bona fide occupational qualification, or is required by and given to an agency of government for security reasons.

(5) For any person, whether or not an employer, an employment agency, a labor organization, or the employees or members thereof to aid, abet, incite, compel or coerce the doing of any act defined in this section to be a discriminatory or unfair employment practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder; or to attempt, either directly or indirectly, to commit any act defined in this section to be a discriminatory or unfair employment practice.

SECTION 6. *Procedure–*

(1) Any person claiming to be aggrieved by a discriminatory or unfair employment practice may, by himself or his attorney-at-law, make, sign and file with the commission a verified, written complaint in duplicate which shall state the name and address of the person, employer, employment agency or labor organization alleged to have committed the discriminatory or unfair employment practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission, a commissioner or the Attorney General may in like manner make, sign and file such complaint.

(2) Any employer or labor organization whose employees or members, or some of them, refuse or threaten to refuse to comply with the provisions of this act may file with the commission a verified written complaint in duplicate asking the commission for assistance to obtain their compliance by conciliation or other remedial action.

(3) After the filing of a complaint, the coordinator or a commissioner shall make, with the assistance of the staff, a prompt investigation thereof, and if such investigating official shall determine that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate such discriminatory or unfair employment practice by conference, conciliation and persuasion.

(4) The members of the commission and its staff shall not disclose the filing of a complaint, the information gathered during the investigation or the endeavors to eliminate such discriminatory or unfair employment practice by conference, conciliation and persuasion, unless such disclosure is made in connection with the conduct of such investigation.

(5) In case of failure to satisfactorily settle a complaint by conference, conciliation and persuasion, or in advance thereof if in the opinion of the investigating official circumstances so warrant, he may issue and cause to be served, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, employment agency or labor organization named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint in writing within 10 days after the date of such notice or within such extended time as the investigating official may allow.

(6) When the investigating official is satisfied that further endeavors to settle a complaint by conference, conciliation and persuasion will be futile, he shall report the same to the commission. If the commission determines that the circumstances warrant, it shall issue and cause to be served a written notice requiring the respondent to answer the charges of such complaint at a hearing before the commission, a commissioner or commissioners, or other person designated by the commission to conduct the hearing, hereinafter referred to as hearing examiner, and at a time and place to be specified in such notice.

(7) The case in support of such complaint shall be presented at the hearing by one of the commission's attorneys or agents. The investigating official shall not participate in the hearing except as a witness nor shall he participate in the deliberations of the commission in such case.

(8) The respondent may file a written verified answer to the complaint and appear at the hear-

ing in person, or otherwise, with or without counsel and submit testimony. In the discretion of the hearing examiner, a complainant may be allowed to intervene and present testimony in person or by counsel.

(9) When a respondent has failed to answer a complaint at a hearing as herein provided, the commission may enter his default. For good cause shown, the commission may set aside an entry of default within 10 days after the date of such entry. In the event the respondent is in default, the commission may proceed to hear testimony adduced upon behalf of the complainant. After hearing such testimony, the commission may enter such order as in its opinion the evidence warrants.

(10) The commission or the complainant shall have the power to reasonably and fairly amend any complaint, and the respondent shall have like power to amend his answer.

(11) The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity, but the right of cross-examination shall be preserved. The testimony taken at a hearing shall be under oath and shall be transcribed.

(12) If, upon all the evidence at a hearing, the commission shall find that a respondent has engaged in or is engaging in, any discriminatory or unfair employment practice as defined in this act, the commission shall state its findings of fact and shall issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such discriminatory or unfair employment practice and to take such affirmative action, including (but not limited to) hiring, reinstatement or up-grading of employees, with or without back pay, the referring of applicants for employment by any respondent employment agency, the restoration to membership by any respondent labor organization, the posting of notices, and the making of reports as to the manner of compliance, as in the judgment of the commission will effectuate the purposes of this act.

(13) If, upon all of the evidence at a hearing, the commission shall find that a respondent has not engaged in any such discriminatory or unfair employment practice, the commission shall state its findings of fact and shall issue and cause to be served an order on the complainant dismissing the complaint.

(14) The commission shall establish rules to govern, expedite and effectuate the foregoing procedures and its own actions thereunder.

(15) Any complaint filed pursuant to this act must be so filed within six months after the alleged discriminatory or unfair employment practice occurred.

SECTION 7. *Judicial review and enforcement* —Any complainant, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue an order, may obtain judicial review thereof, and the commission may obtain an order of court for its enforcement in a proceeding as provided in this section.

(1) Such proceeding shall be brought in the district court of the district in which is located the county wherein the alleged discriminatory or unfair employment practice which is the subject of the commission's order was committed, or wherein any respondent required in the order to cease and desist from a discriminatory or unfair employment practice, or to take other affirmative action, resides or transacts business.

(2) Such proceeding shall be initiated by the filing of a petition in such court, and the service of a copy thereof upon the commission and upon all parties who appeared before the commission. Thereupon the commission shall file with the court a transcript of the record of the hearing before it. The court shall have jurisdiction of the proceeding and the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript an order enforcing, modifying and enforcing as so modified, or setting aside the order of the commission, in whole or in part.

(3) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

(4) Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided such party shows reasonable grounds for the failure to adduce such evidence before the commission.

(5) The findings of the commission as to the facts shall be conclusive if supported by substantial evidence.

(6) The jurisdiction of the court shall be exclusive and its judgment and order shall be final,

subject to review by the supreme court as provided by law.

(7) The commission's copy of the testimony shall be available to all parties for examination at all reasonable times, without cost, and for the purpose of judicial review of the commission's orders.

(8) The commission may appear in court by its own attorney.

(9) Unless otherwise directed by the commission or court, commencement of review proceedings under this section shall operate as a stay of any order.

(10) Positions filed under this section shall be heard expeditiously and determined upon the transcript filed, without requirement for printing. Hearings in the court under this act shall take precedence over all other matters, except matters of the same character.

(11) If no proceeding to obtain judicial review is instituted by a complainant, or respondent within thirty days from the service of an order of the commission pursuant to section 6 hereof, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the jurisdiction of the commission and resides or transacts business within the county in which the petition for enforcement is brought.

SECTION 8. *Repealing Clause.* Article 19, Chapter 81, Colorado Revised Statutes 1953, as amended, is hereby repealed.

SECTION 9. *Constitutionality Clause*—If any provision of this act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect other provisions or applications of this act, and to this end the provisions of this act are declared severable.

SECTION 10. The General Assembly hereby finds, determines and declares that this act is necessary for the immediate preservation of the public peace, health and safety.

Frank L. Hays
President of the Senate

Mildred H. Creswell
Secretary of the Senate

Charles R. Conklin
Speaker of the House of Representatives

Lee Matties
Chief Clerk of the House of Representatives

APPROVED March 13, 1957 at 4:37 p.m.

Stephen L. R. McNichols
GOVERNOR OF THE STATE OF COLORADO

EMPLOYMENT
Fair Employment Laws—Minnesota

The City of St. Paul, Minnesota, enacted an ordinance on January 30, 1955, creating a Fair Employment Practice Commission and making unlawful certain discriminatory practices in employment. Parts of the ordinance have recently received judicial construction in the case of *City of St. Paul v. F. W. Woolworth Co.*, printed *supra* at p. 625. Because of its current interest, the complete ordinance is reproduced below.

AN ORDINANCE to prohibit discriminatory practices in employment and in labor unions, based upon race, color, religious creed, national origin or ancestry; defining unfair practices as unlawful acts; creating a Fair Employment Practice Commission; prescribing its duties and powers and providing procedures; and prescribing penalties for the violation of this ordinance.

The Council of the City of Saint Paul does Ordain:

Section 1. Findings and Declaration of Policy:

(a) Discrimination in public and private employment on the grounds of race, religious creed, color, national origin, or ancestry may substantially and adversely affect the general welfare, public health and good order of this city.

(b) Such discrimination in employment tends unjustly to subject groups of inhabitants of any city to depressed living conditions thereby causing injury to the public safety, general welfare and good order of any city and endangers the public health thereof.

(c) Such discrimination in employment and the resulting effect on the community and the inhabitants thereof, tend to impose substantial financial burdens on the public revenue for the relief and amelioration of conditions so created.

(d) Experience has proved that legislative enactment prohibiting such discrimination in employment tends to remove and ameliorate such conditions and promote the general welfare and good order of any city.

(e) The right of every inhabitant of this city to employment opportunities without being subjected to such discrimination in employment is hereby declared to be a civil right.

(f) This ordinance shall be deemed an exercise of the police power of this city for the protection of the public welfare and health and peace of the inhabitants thereof.

Section 2. Definitions:

(a) The words "discriminate," "discriminates," or "discrimination," wherever used in this ordinance, are hereby defined and declared to mean and include discrimination or segregation on the ground or because of race, religious creed, color, national origin, or ancestry.

(b) The word "employer" wherever used in this ordinance, is hereby defined and declared to include only employers of two or more employees within the City of Saint Paul, but does not include sectarian or religious organizations when religion may be a bona fide qualification for employment, nor those who employ domestics exclusively for employment in a private home.

(c) The word "employee" wherever used in this ordinance, is hereby defined to include all persons who work for wages, salary or commission in the service of an employer, except those engaged in domestic service in a private home, or those engaged in employment by an organized religious congregation, society, or institution when religion may be a bona fide qualification for employment; provided such selection is not based upon race, color, national origin or ancestry.

(d) The term "labor union" shall mean any organization of employees which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances or terms or conditions of employment.

(e) The term "employment agency" wherever used in this ordinance, is hereby defined as any person, company, partnership, association, or corporation which undertakes with or without compensation, to procure opportunities to work or to procure, recruit, refer or place employees.

Section 3. City Employment:

It shall be an unfair practice for any head of department, official, or agent or employee of the City of Saint Paul, or of the Board of Education of the City of Saint Paul, or of any department thereof, acting for or on behalf of said City or said Board, in any matter involving employment by said City or said Board, to discriminate against any person otherwise qualified, in employment or in tenure, terms or conditions of employment; or to discriminate in promotion or increase in compensation; or to publish offers of or to offer employment based upon such discrimination; or to adopt or enforce any rule or employment policy which discriminates between employees or prospective employees; or to seek information relative to race, religious creed, color, national origin or ancestry from any person or employee as a condition of employment, tenure, terms, or in connection with conditions of employment, promotion or increase in compensation; or to discriminate in the selection of personnel for training.

Section 4. City Contracts:

The City of Saint Paul and all of its contracting agencies and departments thereof shall include in all contracts hereafter negotiated, a provision obligating the contractor not to discriminate against any employee of, or applicant for employment with, such contractor in the City of Saint Paul, and shall require such contractors to include a similar provision in all subcontracts requiring employment within the City of Saint Paul.

Section 5. Unfair Employment Practices Prohibited:

(a) It shall be an unfair practice for any employer, labor union, or person within said City to discriminate against any person in connection with any hiring, application for employment, tenure, promotion, upgrading, increase in compensation, layoff, discharge, terms and con-

ditions of employment. [As amended April 4, 1956.]

(b) It shall be an unfair practice for any person, firm or corporation engaged in the business of or acting as an employment, referral, or vocational placement agency or bureau within said City, to discriminate against any person in connection with any application for employment, referral for employment, hiring, tenure, terms or conditions of employment.

(c) It shall be an unfair practice, with respect to employees covered by this ordinance within said City, for any employer covered by this ordinance, or labor union, or any person, firm or corporation engaged in the business of or acting as an employment, referral or vocational placement agency or bureau, or any agency engaged in whole or in part in the investigation of applicants for employment or in the investigation of employees, to include in any application form or biographical statement relating to employment, any question or statement designed to elicit or record information concerning the race, religious creed, color, national origin, or ancestry of the applicant. However, this section shall not prohibit any employer from securing, or any employee from furnishing, information concerning the national origin or ancestry of an employee or applicant for employment when such information has been required by the Government of the United States, the State of Minnesota, or any political subdivision thereof, for the purpose of national security.

(d) It shall be an unfair practice for any labor union within said City to discriminate against any person with respect to membership in a labor union as defined in Section 2(d) of this ordinance.

(e) It shall be an unfair practice for any employer, employment agency, or labor union, prior to employment or admission to membership to cause to be printed, published or circulated any notice or advertisement relating to employment or membership indicating any preference, limitation, specification or discrimination based upon race, color, religion, national origin or ancestry.

(f) It shall be an unfair practice for any employer, employment agency, labor union, or investigating agency to penalize or discriminate in any manner against any individual because he has opposed any practice forbidden by this ordinance or because he has made a charge, testified or assisted in any manner in any investigation, proceeding or hearing thereunder.

Section 6. Fair Employment Practice Commission:

(a) There is hereby created a permanent Fair Employment Practice Commission which shall consist of a chairman and four other members to be appointed by the Mayor and to be confirmed by the Council. The first chairman shall be appointed for a term of five years and the remaining four members shall be appointed for terms respectively for four years, three years, two years, and one year. Each of said appointees shall serve for his respective term and until the respective successor has been appointed and has assumed office. After the expiration of the initial term, each of the members shall be appointed and shall serve for a five-year term and until his respective successor has been appointed and has assumed office. Any member of the Commission may be removed by the Mayor upon notice and hearing for neglect of duty, misconduct or malfeasance in office. All members of the Commission shall serve without compensation.

(b) To qualify for appointment to membership on the Commission, a person shall meet at least the following minimum qualifications: he or she shall be not less than 30 years of age and have been a resident and registered voter in the City of Saint Paul for at least five years.

Section 7. Powers and Duties of the Commission:

The Commission is granted the following powers and charged with the duties of:

(a) Effectuating the purpose and policies of this ordinance.

(b) To meet at any place within the City Hall and Court House approved by the City Council.

(c) At such times as deemed necessary to appoint personnel subject to Council approval, and at a salary fixed by the Council. The position of executive secretary shall be exempt from Civil Service classification in accordance with Section 100 of the Charter. [As amended November 22, 1955.]

(d) Promoting cooperation among all groups for the purpose of effectuating the purposes and policies of this ordinance.

(e) Conducting studies concerning discrimination in employment and related problems.

(f) To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this ordinance and the policies and

practice of the Commission in connection therewith, subject to the approval of the Council.

(g) To receive complaints of violations and investigate into the merits thereof; to hold hearings on said complaints, as provided in Section 9 hereof, and thereafter to certify and recommend to the City Corporation Counsel the prosecution of those complaints which, in the judgment of said commission, are deemed to be violations of this ordinance. Nothing contained in this section shall be construed to limit the right of the complainant to make and file a complaint without such certificate or recommendation by the said commission, nor to preclude, abridge, nor restrict the right of appeal or the right of anyone concerned or affected to a full hearing of the facts and issues in the courts of competent jurisdiction on the evidence and merits in any matter involved. Any such proceeding shall not be one of review only.

(h) To make reports of its activities to the City Council annually or more often as requested by the City Council.

Section 8. Penalty:

(a) An "unfair practice," as used in this ordinance, is hereby declared to be an unlawful act.

(b) Any person, firm, corporation, labor union, association, or employment agency, whether acting in an official capacity or in a private capacity, who commits an "unfair practice" as defined herein, is guilty of a misdemeanor and subject to the penalties therefor according to law.

Section 9. Procedures:

(a) Any person claiming to be aggrieved by an alleged unfair practice may file with the commission a signed complaint in writing which shall state the name and address of the employer, labor union or employment agency or other person (herein referred to as the respondent) alleged to have committed the unfair practice complained of and shall set forth the particulars thereof and such other information as may be required.

(b) If such commission shall determine after investigation that probable cause exists for crediting the allegations of the charge, it shall immediately endeavor to eliminate the unfair practice complained of by conciliation and persuasion. The members of the commission and its staff shall not disclose what has transpired during the course of such endeavors, except as herein authorized by the other provisions of this ordinance. If the commission shall determine after investigation that no probable cause exists to credit the allegations of the charge, the commission shall within ten days from the date of such determination, cause to be issued and served upon the complainant and the respondent written notice of such determination.

(c) If the commission fails to eliminate such unfair practice by conciliation, the commission shall serve upon the respondent a formal complaint requiring said respondent to answer such complaint at a public hearing before the commission at a place therein fixed to be held not less than ten (10) days after the service of said complaint. The respondent shall have the right to file an answer and to appear at such hearing in person or by attorney or otherwise and to examine and cross-examine witnesses. If, upon all the evidence, the commission shall determine that the respondent has engaged or is engaging in an unfair practice, the commission shall state its findings of fact and shall render such recommendations as the findings warrant. If, upon all the evidence, the commission shall fail to find that the respondent has engaged in an unfair practice, the commission shall so state in its findings and shall issue and serve upon the complainant and respondent an order dismissing said complaint. In the event the respondent refuses or fails to comply with any recommendations issued by the commission, the commission shall then proceed in accordance with the provisions of Section 7(g) hereof.

Section 10. Severability:

If any provision of this ordinance or the application of such provision to any person or circumstance shall be invalid, the remainder of such ordinance or the application of such provision to persons or circumstances other than those to which it has been held invalid shall not be affected thereby.

Section 11. Effective Date:

This ordinance shall take effect and be in force 30 days after its passage, approval, and publication. [Approved, January 13, 1955.]

ELECTIONS
Registration—North Carolina

Senate Bill No. 210 of the 1957 session of the North Carolina General Assembly, enacted on April 12, 1957, amends the statutory qualifications for electors in North Carolina by removing the "grandfather clause" [which exempts from certain requirements for registration any person who was an elector in 1867 and his descendants]. The act also makes provisions for administrative appeals from the rulings of registrars and provides for court review of such appeals proceedings.

AN ACT TO AMEND ARTICLE 6, CHAPTER 163 OF THE GENERAL STATUTES RELATING TO REGISTRATION OF VOTERS.

The General Assembly of North Carolina do enact:

Section 1. Article 6, Chapter 163 of the General Statutes is hereby amended by rewriting G. S. 163-28, to read as follows:

"Every person presenting himself for registration shall be able to read and write any Section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this Section."

Sec. 2. Article 6, Chapter 163 of the General Statutes is further amended by inserting a new Section, G. S. 163-28.1, to read as follows:

"Any person who is denied registration for any reason may appeal the decision of the registrar to the county board of elections of the county in which the precinct is located. Notice of appeal shall be filed with the registrar who denied registration, on the day of denial or by 5:00 P. M. on the day following the day of denial. The notice of appeal shall be in writing, signed by the appealing party, and shall set forth the name, age and address of the appealing party, and shall state the reasons for appeal."

Sec. 3. Article 6, Chapter 163 of the General Statutes is further amended by inserting a new Section, G. S. 163-28.2, to read as follows:

"Every registrar receiving a notice of appeal shall promptly file such notice with the county board of elections, and every person appealing to the county board of elections shall be entitled to a prompt and fair hearing on the question of such person's right and qualifications to register as a voter. A majority of the county board of elections shall be a quorum for the purpose of hearing appeals on the question of registration, and the decision of a majority of the members of the board shall be the decision of the board. All cases on appeal to a county board of elections shall be heard de novo, and the board is authorized to subpoena witnesses and to compel their attendance and testimony under oath, and is further authorized to subpoena papers and documents relevant to any matter pending before the board. If at the hearing the board shall find that the person appealing from the decision of the registrar is able to read and write any Section of the Constitution of North Carolina in the English language and if the board further finds that such person meets all other requirements of law for registration as a voter in the precinct to which application was made, the board shall enter an order directing that such person be registered as a voter in the precinct from which the appeal was taken. The county board of elections shall not be authorized to order registration in any precinct other than the one from which an appeal has been taken. Each appealing party shall be notified of the board's decision in his case not later than ten (10) days after the hearing before the board."

Sec. 4. Article 6, Chapter 163 of the General Statutes is further amended by inserting a new Section, G. S. 163-28.3, to read as follows:

"Any person aggrieved by a final order of a county board of elections may at any time within ten (10) days from the date of such order appeal therefrom to the Superior Court of the county in which the board is located. Upon such appeal, the appealing party shall be the plaintiff and the county board of elections shall be the defendant, and the matter shall be heard de novo in the Superior Court in the same manner as other civil actions are tried and disposed of therein. If the decision of the court be that the order of the county board of elections shall be set aside, then the court shall enter its order so providing and adjudging that such person is entitled to be registered as a qualified voter in

the precinct to which application was originally made, and in such case the name of such person shall be entered on the registration books of that precinct. The court shall not be authorized to order the registration of any person in a precinct to which application was not made prior to the proceeding in court. From the judgment of the Superior Court an appeal may be taken to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions."

Sec. 5. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 6. This Act shall be effective upon its ratification.

In the General Assembly read three times and ratified, this the 12th day of April, 1957.

L. E. Barnhardt
President of the Senate

J. K. Doughton
Speaker of the House of Representatives

FAMILY RELATIONS
Marriage—Colorado

House Bill No. 39 of the 1957 session of the Colorado Legislature, enacted and signed by the governor on March 15, 1957, repeals that state's miscegenation law. The repealing act, however, substantially re-enacts provisions concerning penalties for contracting or solemnizing incestuous marriages. The *repealed* sections are set out below:

90-1-2. MISCEGENATION. [*Repealed*] All marriages between Negroes or mulattoes of either sex, and white persons are declared to be absolutely void. Nothing in this section shall be so construed as to prevent the people living in that portion of the state acquired from Mexico from marrying according to the custom of that country.

90-1-3. CONTRACTING OR SOLEMNIZING VOID MARRIAGE—PENALTY [*Repealed*] Any person knowingly contracting marriage in fact contrary to the prohibition in section 90-1-2, and any person knowingly solemnizing any such marriage or any incestuous marriage prohibited by section 40-9-5 shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty nor more than five hundred dollars, or imprisonment of not less than three months nor more than two years, or both, at the discretion of the court.

CONSTITUTIONAL LAW
Interposition and Nullification—Florida

House Concurrent Resolution No. 174 of the 1957 session of the Florida Legislature, filed in the office of the Secretary of State May 2, 1957, invokes the doctrine of interposition. The resolution states that certain decisions of the United States Supreme Court have usurped powers reserved to the states and declares that a contest of power has arisen between the State of Florida and the United States Supreme Court. The resolution declares that "it is the intent and duty of all officials, state and local, to observe, honorably, legally and constitutionally, all appropriate measures available to resist these illegal encroachments upon the sovereign powers of this State."

HOUSE CONCURRENT RESOLUTION
NO. 174

A RESOLUTION to declare the United States Supreme Court decisions usurping the powers reserved to the states and relating to education, labor, criminal procedure, treason and subversion to be null, void and of no effect;

to declare that a contest of powers has arisen between the State of Florida and the Supreme Court of the United States; to invoke the doctrine of interposition; and for other purposes.

Be It Resolved by the House of Representatives of the State of Florida, the Senate Concurring:

That the Legislature of Florida doth hereby unequivocally express a firm and determined resolution to maintain and defend the Constitution of the United States, and the Constitution of this State against every attempt, whether foreign or domestic, to undermine and destroy the fundamental principles, embodied in our basic law, by which the liberty of the people and the sovereignty of the States, in their proper spheres, have been long protected and assured;

That the Legislature of Florida doth explicitly and pre-emptorily declare that it views the powers of the Federal Government as resulting solely from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument creating that compact;

That the Legislature of Florida doth explicitly the powers of the Federal Government are valid only to the extent that these powers have been enumerated in the compact to which the various States assented originally and to which the States have assented in subsequent amendments validly adopted and ratified;

That the very nature of this basic compact, apparent upon its face, is that the ratifying States, parties thereto, have agreed voluntarily to surrender certain of their sovereign rights, but only certain of these sovereign rights, to a Federal Government thus constituted; and that all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, have been reserved to the States respectively, or to the people;

That the State of Florida has at no time surrendered to the General Government its right to exercise its powers in the field of labor, criminal procedure, and public education, and to maintain racially separate public schools and other public facilities;

That the State of Florida, in ratifying the Fourteenth Amendment to the Constitution, did not agree, nor did the other States ratifying the Fourteenth Amendment agree, that the power to regulate labor, criminal proceedings, public education, and to operate racially separate public schools and other facilities was to be prohibited to them thereby;

And as evidence of such understanding as to the inherent power and authority of the States to regulate public education and the maintenance of racially separate public schools, the Legislature of Florida notes that the very Congress that submitted the Fourteenth Amendment for ratification established separate schools in the District of Columbia and that in more than one instance the same State Legislatures that ratified the Fourteenth Amendment also provided for systems of racially separate public schools;

That the Legislature of Florida denies that the Supreme Court of the United States had the right which it asserted in the school cases decided by it on May 17, 1954, the labor union case decided on May 21, 1956, the cases relating to criminal proceedings decided on April 23, 1956, and January 16, 1956, the anti-sedition case decided on April 2, 1956, and the case relating to teacher requirements decided on April 9, 1956, to enlarge the language and meaning of the compact by the States in an effort to withdraw from the States powers reserved to them and as daily exercised by them for almost a century;

That a question of contested power has arisen; the Supreme Court of the United States asserts, for its part, that the States did in fact prohibit unto themselves the power to regulate labor matters, criminal proceedings and public education and to maintain racially separate public institutions and the State of Florida, for its part, asserts that it and its sister States have never surrendered such rights;

That these assertions upon the part of the Supreme Court of the United States, accompanied by threats of coercion and compulsion against the sovereign States of this Union, constitute a deliberate, palpable, and dangerous attempt by the Court to prohibit to the States certain rights and powers never surrendered by them;

That the Legislature of Florida asserts that whenever the General Government attempts to engage in the deliberate, palpable and dangerous exercise of powers not granted to it, the States who are parties to the compact have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties appertaining to them;

That failure on the part of this State thus to

assert its clear rights would be construed as acquiescence in the surrender thereof; and that such submissive acquiescence to the seizure of one right would in the end lead to the surrender of all rights, and inevitably to the consolidation of the States into one sovereignty, contrary to the sacred compact by which this Union of States was created;

That the question of contested power asserted in this resolution is not within the province of the Court to determine because the Court itself seeks to usurp the powers which have been reserved to the States, and, therefore, under these circumstances, the judgment of all the parties to the compact must be sought to resolve the question. The Supreme Court is not a party to the compact, but a creature of the compact and the question of contested power should not be settled by the creature seeking to usurp the power, but by the parties to the compact who are the people of the respective States in whom ultimate sovereignty finally reposes;

That the Constitution of the State of Florida provides for full benefits to all its citizens with reference to educational facilities and under the Laws of Florida enacted by the Legislature through the Minimum Foundation Program its citizens under states' rights, all are being educated under the same general law and all teachers are being employed under identical educational qualifications and all are certified by the State Board of Education alike, which enables the people, themselves, in Florida to provide an educational establishment serviceable and satisfactory and in keeping with the social structure of the state. The people of Florida do not consent to changing state precedents and their rights by having doctrines thrust upon them by naked force alone, as promulgated in the school cases of May 17, 1954, and May 31, 1955;

That the doctrines of said decisions and other decisions denying to the States the right to have laws of their own dealing with subversion or espionage, and criminal proceedings, and denying the States the right to dismiss individuals from public employment who refuse to answer questions concerning their connections with communism by invoking the Fifth Amendment, and denying the States the right to provide for protective "right to work" laws, should not be forced upon the citizens of this State for the Court was without jurisdiction, power or authority to interfere with the sovereign powers of the State in such spheres of activity.

That the Court in its decisions relating to public education was without jurisdiction because (1) the jurisdiction of the Court granted by the Constitution is limited to judicial cases in law and equity, and said cases were not of a judicial nature and character, nor did they involve controversies in law or equity, but, on the contrary, the great subjects of the controversy are of a legislative character, and not a judicial character, and are determinable only by the people themselves speaking through their legislative bodies; (2) the essential nature and effect of the proceedings relating exclusively to public schools operated by and under the authority of States, and pursuant to State laws and regulations, said cases were suits against the States, and the Supreme Court was without power or authority to try said cases, brought by individuals against States, because the Constitution forbids the Court to entertain suits by individuals against a State unless the State has consented to be sued;

That if said Court had had jurisdiction and authority to try and determine said cases, it was powerless to interfere with the operation of the public schools of States, because the Constitution of the United States does not confer upon the General Government any power or authority over such schools or over the subject of education, jurisdiction over these matters being reserved to the States, nor did the States by the Fourteenth amendment authorize any interference on the part of the Judicial Department or any other department of the Federal Government with the operation by the States of such public schools as they might in their discretion see fit to establish and operate;

That by said cases the Court announces its power to adjudge State laws unconstitutional upon the basis of the Court's opinion of such laws as tested by rules of the inexact and speculative theories of psychological knowledge, which power and authority is beyond the jurisdiction of said Court;

That if the Court is permitted to exercise the power to judge the nature and effect of a law by supposed principles of psychological theory, and to hold the statute or Constitution of a State unconstitutional because of the opinions of the Judges as to its suitability, the States will have been destroyed, and the indestructible Union of Indestructible States established by the Constitution of the United States will have ceased to exist, and in its stead the Court will have

created, without jurisdiction or authority from the people, one central government of total power;

That implementing its decision relating to public education of May 17, 1954, said Court on May 31, 1955 upon further consideration of said cases, said: "All provisions of Federal, State, or local law . . . must yield" to said decision of May 17, 1954; said Court thereby presuming arrogantly to give orders to the State of Florida;

That it is clear that said Court has deliberately resolved to disobey the Constitution of the United States, and to flout and defy the Supreme Law of the Land;

That the State of Florida, as is also true of the other sovereign states of the Union, has the right to enact laws relating to subversion or espionage, criminal proceedings, dismissing public employees who refuse to answer questions concerning their connections with communism and "right to work" protection, and has the right to operate and maintain a public school system utilizing such educational methods therein as in her judgment are conducive to the welfare of those to be educated and the people of the State generally, this being a governmental responsibility which the State has assumed lawfully, and her rights in this respect have not in any wise been delegated to the Central Government, but, on the contrary, she and the other States have reserved such matters to themselves by the terms of the Tenth Amendment. Being possessed of this lawful right, the State of Florida is possessed of power to repel every unlawful interference therewith;

That the duty and responsibility of protecting life, property and the priceless possessions of freedom rests upon the Government of Florida as to all those within her territorial limits. The State alone has this responsibility. Laboring under this high obligation she is possessed of the means to effectuate it. It is the duty of the State in flagrant cases such as this to interpose its powers between its people and the effort of said Court to assert an unlawful dominion over them; THEREFORE,

Be It Further Resolved by the House of Representatives of the State of Florida, the Senate Concurring:

Section 1. That said decisions and orders of the Supreme Court of the United States denying the individual sovereign states the power to enact laws relating to espionage or subversion, criminal proceedings, the dismissal of public employees for refusal to answer questions concerning their connections with communism, "right to work" protection, and relating to separation of the races in the public institutions of a State are null, void and of no force or effect.

Section 2. That the elected representatives of the people of Florida do now seriously declare that it is the intent and duty of all officials, state and local, to observe, honorably, legally and constitutionally, all appropriate measures available to resist these illegal encroachments upon the sovereign powers of this State.

Section 3. That we urge firm and deliberate efforts to check these and further encroachments on the part of the Federal Government, and on the part of said Court through judicial legislation, upon the reserved powers of all the States' powers never surrendered by the remotest implication but expressly reserved and vitally essential to the separate and independent autonomy of the States in order that by united efforts the States may be preserved.

Section 4. That a copy of this Resolution be transmitted by His Excellency The Governor to the Governor and Legislature of each of the other States, to the President of the United States, to each of the Houses of Congress, to Florida's Representatives and Senators in the Congress, and to the Supreme Court of the United States for its information.

Filed in Office Secretary of State May 2, 1957.

CONSTITUTIONAL LAW
Tenth Amendment—Florida

Senate Memorial No. 530 of the 1957 session of the Florida Legislature proposes that the Tenth Amendment to the United States Constitution be amended so as to state that the maintenance of "harmonious race relations" be included within the police powers reserved to the states.

A MEMORIAL to the Congress of the United States of America proposing an amendment to the tenth amendment of the Constitution of the United States by enumerating certain of the reserve powers of the states in respect to the exercise of state police power and providing means to safeguard such powers from encroachment.

WHEREAS, it is imperative to maintain an equilibrium of power in a federated system of government that contemplates a division of responsibility between the national or central government and the respective sovereign states,

WHEREAS, it appears that unless the states' residual power is at least broadly delineated and safeguarded to some appreciable degree the central government will continue by lack of definitive guidelines and checks to encroach upon the powers of the respective states, NOW, THEREFORE,

Be It Resolved by the Legislature of the State of Florida:

That the Congress of the United States is hereby memorialized and respectfully urged to propose such amendment to the Tenth Amendment to the Constitution of the United States to provide that among the rights and powers reserved to each state are the police powers to enact regulations to promote the public peace, safety and welfare of the state and to provide for good order, education and harmonious race relations therein. In these enumerated fields except where the Congress of the United States by legislation provides expressly to the contrary the laws and regulations of the state shall govern.

CONSTITUTIONAL LAW
Amendments—Florida

Senate Concurrent Resolution No. 116 of the 1957 session of the Florida Legislature proposes an amendment to the United States Constitution which would provide for vesting appellate jurisdiction in the United States Senate of decisions of the United States Supreme Court involving the powers of a state or where a state is a party or otherwise interested in a case.

A CONCURRENT RESOLUTION memorializing Congress to call a convention for the purpose of considering an amendment to the Constitution of the United States relative to appeals from decisions of the supreme court of the United States involving states' rights to the Senate of the United States.

Be It Resolved by the Senate of the State of Florida, the House of Representatives Concurring:

That the Florida State Legislature does hereby make application to the Congress of the United States to call a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States, to wit:

ARTICLE_____

Section 1. *Jurisdiction of senate as an appellate court.*—The Senate of the United States shall comprise a court with final appellate jurisdiction to review decisions and judgments of the Supreme Court of the United States, where questions of the powers reserved to the states, or the

people, are either directly or indirectly involved and decided, and a state is a party or anywise interested in such question involved and decided. The senate's exercise of such final appellate jurisdiction shall be under such rules and regulations as may be provided by the senate, including the time within which appeals shall be taken. The decision of the senate affirming, modifying or reversing the decision or judgment of the Supreme Court of the United States shall be final.

BE IT FURTHER RESOLVED that the Congress of the United States be, and it is hereby requested to provide as the mode of ratification that said amendment shall be valid to all intents and purposes, as part of the Constitution of the United States, when ratified by the legislature of three-fourths of the several states; and

BE IT FURTHER RESOLVED that a duly attested copy of this resolution be immediately transmitted to the secretary of the Senate of the United States, the clerk of the House of Representatives of the United States and to each member of the Congress from this State.

CIVIL RIGHTS LEGISLATION
Veto—New York

A bill (Senate Bill No. 3816) which was passed by the New York legislature in its 1957 session would have established a "civil rights bureau" in the office of the state Attorney General. The bill was vetoed by the governor because, he stated, it would have removed from the State Commission Against Discrimination its principal duties and vested them in the attorney general. The message of the governor returning the bill unsigned follows:

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY

April 24, 1957

MEMORANDUM filed with Senate Bill, Introductory Number 3527, Print Number 3816, entitled:

"AN ACT making an appropriation to the department of law for the establishment and maintenance of a civil rights bureau"

NOT APPROVED

This bill would set up a "civil rights bureau" in the Attorney General's office "to perform the functions and responsibilities of the Attorney General or the department in the enforcement of the laws of this State against discrimination by reason of race, creed, color or national origin."

Section 295 of the Executive Law now vests the power "to receive, investigate and pass upon complaints" in the State Commission Against Discrimination which has had such powers since its inception. Through the receipt and investigation of complaints, SCAD has been reaching into the business community and investigating and checking unfair discriminatory practices. More than 4200 complaints have been filed with the Commission since its establishment, and the number of complaints received in 1956 has doubled those filed in prior periods. Receipt and investigation of complaints has been the core of its operation.

The intent of this bill appears to be for the new bureau to take over some of SCAD's principal duties. According to the statement dated February 27, 1957 and released at the time of the bill's introduction, the new bureau's "primary function would be to receive and coordinate complaints of discriminatory practices and file them with the State Commission Against Discrimination for determination." This, the Majority leaders profess "will provide a more workable, effective means of initiating complaints and investigations in the office of the State's chief law enforcement officer." They would appoint five new Assistant Attorneys General to do the job now being done by the Commission, and $100,000 would be appropriated to the Attorney General for the purpose. The statement deplored "militancy," emphasizing instead

that SCAD's role should be whittled down to that of "primarily a judicial agency."

The Law Against Discrimination has given the Attorney General's office the power and authority to file complaints with the Commission since its creation 12 years ago. Yet, the Attorney General has filed not a single complaint. The Republican proposal to increase the Attorney General's power at the Commission's expense came just when the Commission was asking the Legislature for the authority to initiate complaints on its own motion.

It is not surprising therefore, that the bill has been condemned by virtually every organization interested in civil rights and equality of opportunity. For in effect, it is an anti-civil rights measure. The New York branch of the National Association for the Advancement of Colored People characterizes it as an "arrant betrayal of civil rights."

In a statement dated April 4, 1957, signed by 26 organizations, the measure is seen as inviting a "distinct setback" in civil rights. Their statement says:

> "SCAD would be relegated to the role of a bystander, ready merely to adjudicate rights in cases first sifted through the Attorney General's office. That would be in direct conflict with the legislative mandate to the Commission 'To eliminate and *prevent* discrimination . . .' The establishment of a separate $100,000 Civil Rights Bureau in the Attorney General's office would create unfortunate confusion and duplication. Persons discriminated against would be uncertain where to go for redress. Indeed, having two civil rights agencies might lead to harmful and undignified competition. Complaints, if and when referred to SCAD by the Attorney General's office, would involve a second procedure of complaint and investigation before SCAD could act. It might introduce political considerations in a field in which bi-partisanship has always, fortunately, been the tradition. The inevitable result would be to weaken and erode SCAD's effectiveness."

The organizations subscribing to this statement include, among others:

> The National Association for the Advancement of Colored People
> Urban League of Greater New York
> The American Jewish Congress
> Citizens Union of the City of New York
> The State Committee Against Discrimination in Housing
> Council of Spanish American Organizations of Greater New York
> Metropolitan Council of Bnai Brith
> New York City and New York State CIO Councils
> The Brotherhood of Sleeping Car Porters

These organizations issued their statement after a conference called by the Attorney-General in which the proposal was thoroughly presented.

I have also been urged to veto the measure by: the Citizens Housing and Planning Council, the American Jewish Committee (New York Chapter), the New York State Council of Churches and the Commerce and Industry Association of New York.

As Governor, I shall encourage every effort to expand the protection of minorities against unfair practices and widen their opportunities for employment, housing and public accommodation. I will not, however, approve any measure which will frustrate the gains we have made or which seeks to obstruct progress in civil rights.

The bill is disapproved.

AVERELL HARRIMAN

SPORTS
Interracial—Alabama

Ordinance No. 15-57, adopted by the Montgomery, Alabama, City Commissioners on March 19, 1957, prohibits interracial participation in sports or games. Violation of the ordinance is made a misdemeanor.

AN ORDINANCE NO. 15-57

Be it ordained by the Commissioners of the City of Montgomery, as follows:

(a) It shall be unlawful for white and colored persons to play together or, in company with each other, in the City of Montgomery and within its police jurisdiction, in any game of cards, dice, dominoes, checkers, pool, billiards, softball, basketball, baseball, football, golf, track, and at swimming pools, beaches, lakes or ponds or any other game or games or athletic contest or contests, either indoors or outdoors.

(b) Any person, who, being the owner, proprietor, or keeper or superintendent of any tavern, inn, restaurant, park or other public house or public place, or the clerk, servant or employee of such owner, proprietor, keeper or superintendent, knowingly permits white persons and colored persons to play together or in company with each other in the City of Montgomery and within its police jurisdiction any game of cards, dice, dominoes, checkers, pool, billiards, softball, basketball, baseball, football, golf, track, and at swimming pools, beaches, lakes or ponds, or any other game or games or athletic contest or contests, in his house, or on his premises, or in a house or on premises under his charge, supervision or control, shall be guilty of a misdemeanor against the City of Montgomery.

(c) The words "colored person", as used herein, shall have the same meaning as "person of color" as defined in Section 2 of Title 1 of the 1940 Code of Alabama.

(d) Any person, firm or corporation, violating any of the provisions of this ordinance shall be guilty of a misdemeanor against the City of Montgomery.

(e) The provisions of this ordinance are severable and should any sentence, paragraph, section, or clause of this ordinance be declared unconstitutional by any Court of competent jurisdiction, then such action by said Court shall not affect the other provisions of this ordinance which are otherwise constitutional.

(f) This ordinance shall take effect as provided by law after passage, approval and publication.

Adopted March 19, 1957
Silas D. Cater, City Clerk

Approved March 19, 1957
W. A. Gayle
Frank W. Parks
Clyde C. Sellers
Commissioners

ADMINISTRATIVE AGENCIES

EDUCATION
Student Activities—Georgia

The Georgia State Board of Education, on April 22, 1957, adopted a resolution prohibiting participation by students in interracial meetings or programs of any club, organization or group. The resolution also provides for the withdrawal of recognition of an organization which sponsors an interracial meeting or program.

"Now therefore be it resolved by the State Board of Education of Georgia:

1. **"THAT** no organization or group with clubs or chapters in public schools of Georgia shall be allowed to invite members of said clubs or chapters to participate in any conference, program or meeting where the white and Negro students are mixed, nor shall said organizations or groups announce in the public schools of Georgia such racially mixed conferences, programs or meetings involving the students of the public schools of Georgia.

2. **"THAT** should there be any such conference, program or meeting which has been planned and announced to take place at some date after April 22, 1957, and invitations to attend have been extended to members of the local student clubs or chapters in the public schools of Georgia, the organizations or groups so responsible shall take notice of this resolution and be governed as though no invitations had been extended so far as the public school students in Georgia are concerned, and failing to thus comply with the requirements of this resolution shall be barred from further participation as a recognized school activity in the schools of Georgia.

"3. **THAT ALL** organizations or groups now operating or in the future desiring to operate student clubs or chapters in the public schools of Georgia shall be required to affirm to the State Board of Education of intention to comply with the provisions of this resolution, and thus pledge not to plan or allow any racially mixed conferences, programs or meetings involving the public school students of Georgia. Said organizations or groups shall be fully responsible and upon proof that students from the public schools of Georgia have been in attendance at any conference, program or meeting either within the State of Georgia or outside the State of Georgia at which the white and Negro races are mixed, the organization or group holding, sponsoring or cooperating in such conference, program or meeting shall cease to be a recognized school activity.

"4. **THAT ANY** organization or group which fails or refuses to make the affirmation stated above and does not pledge as afore stated, shall not be allowed to operate any local club or chapter in the public schools of Georgia."

LICENSING
Radio Broadcasting—Federal Statutes

In Re Applications of MERCER BROADCASTING COMPANY, Trenton, N. J. (Docket No. 10931) and Drew J. T. O'KEEFE, Jack J. DASH and William F. WATERBURY, Levittown-Fairless Hills, Penna. (Docket No. 10933).

Federal Communications Commission, May 9, 1957, No. FCC 57-460.

SUMMARY: Two parties filed applications with the Federal Communications Commission

for permits to construct radio stations to operate on the same frequency and at the same power. Mercer proposed to construct its station in Trenton, New Jersey, and the O'Keefe group desired to construct in Levittown-Fairless Hills, Pennsylvania. After hearings before an examiner both applicants were found to be legally, technically, financially and otherwise qualified for a permit. The applications were then set down for hearing before the Commission because they would involve mutually prohibitive interference. Among other considerations urged by Mercer for granting its application and refusing that of O'Keefe was that the O'Keefe group proposed to serve the Levittown-Fairless Hills section which was not a "community" as provided in Section 307(b) of the Communications Act. It was contended that the exclusion of Negroes from purchasing homes in Levittown [see, e.g., *Johnson v. Levitt & Sons*, 131 F.Supp. 114, 1 Race Rel. L. Rep. 158 (E.D. Pa. 1955)] would, as a matter of public policy, deprive the area of the status of a "community." The Commission stated that there was no evidence in the record of discrimination against Negroes in the sale of houses and, even if true, the assertion would have no bearing on the application for a construction permit. Part of the Commission's opinion follows:

* * *

PRINCIPAL COMMUNITIES TO BE SERVED BY O'KEEFE

28. Levittown and Fairless Hills are contiguous areas located in Lower Bucks County between major highway routes US #1, #13 and #413. Neither Levittown[28] nor Fairless Hills is a political entity. Levittown is currently part of one borough and three townships: Tullytown Borough and Bristol, Falls and Middletown Townships. Fairless Hills is located in Falls Township, but does not encompass the whole Township. A part of Bristol Township, excluding Levittown, was included in the Philadelphia Urbanized Area in the 1950 United States Census Report. Falls, Tullytown and Middletown were not so included. None of these townships or borough was included in the Trenton Urbanized Area in the 1950 United States Census Report. In the same report, Bucks County, in its entirety, was included in the Standard Metropolitan Area of Philadelphia, Pennsylvania. The Levittown-Fairless Hills area is approximately ten miles from the city limits of Philadelphia.

29. In a report of the Bucks County Planning Commission, entitled "Residential Land Development, Lower Bucks County," dated May, 1954, Levittown and Fairless Hills are referred to as "two major subdivisions" of the "Central Urban Area"[29] of Lower Bucks County. In a report of the Bucks County Planning Commission on "Population and Housing, Lower Bucks County Regional Plan," dated March, 1954, the following statement is made:

> "Despite the great increase in industrial employment in Lower Bucks County since 1950, the figures on place of employment of Levittowners show that the area continues to be a considerable extent a dormitory suburb for industrial workers employed in Philadelphia and Trenton. * * *"

In 1953, 37.5% of all employed persons living in Levittown worked in the Philadelphia area and 25.3% in the Trenton-Morrisville area; not more than 2 out of 5 Levittown residents worked in Lower Bucks County; the number of Levittown residents working in Philadelphia increased from 28% in October 1952 to 35% in December 1952 and to 37% in January 1953.

30. Construction of Levittown commenced in or about June of 1952 and construction of Fairless Hills shortly thereafter. As pointed out in footnote 11, *supra*, there were about 28,000 persons residing in Levittown and 5,440 in Fairless Hills as of September 1954, according to the best estimate possible in the absence of census figures. It was stipulated by the parties that, as of September 1954, there were 8,750 homes in

28. There was testimony that an unsuccessful attempt to consolidate the Levittown area into one city government had been defeated. This testimony is not precise, however. There is no indication of any formal attempt of a similar nature with respect to Fairless Hills.

29. This area is defined as follows: "1. The *Central Urban Area* is roughly bounded by the Delaware River, the Neshaminy Creek, and the two major railroads to the north. This area includes the townships of Bristol, Falls, and the lower part of Middletown, the boroughs enclosed by these townships; and the two major subdivisions, Levittown and Fairless Hills."

Levittown, all of which were occupied, and 2,000 homes in Fairless Hills, of which 1,700 were occupied.

31. There is a postmaster in Levittown and also in Fairless Hills. There are no official police, fire, or sanitation departments in Levittown and Fairless Hills. These services are performed by the three townships and borough in which Levittown-Fairless Hills are located. There are a telephone exchange, a telegraph office, and several public libraries in Levittown. In Levittown and Fairless Hills, there are 10 Protestant churches, 1 Catholic church and 1 Jewish synagogue. About 60 civic groups, including the Levittown Civic Association, Junior Chamber of Commerce, and the Rotary Club, function in Levittown-Fairless Hills and Bucks County. In the Levittown-Fairless Hills area, there are 7 elementary schools: 3 in Bristol Township, 1 in Tullytown Borough, and 3 in Falls Township, including a parochial school. There is no high school located in Levittown or Fairless Hills at the present time. Children of high school age attend Dehass High School in Bensalem Township, about four miles away.

32. There are approximately 80 commercial establishments located in Levittown and Fairless Hills. The Levittown Shopping Center is located on Route #13 and Levittown Parkway at the southern edge of Levittown and close to the Tullytown-Levittown Station of the Pennsylvania Railroad. It is the largest shopping center in Lower Bucks County. At present, there are three buildings, plus the Levittown Administration Building and a service station. A motion picture theatre and two additional buildings are under construction, the larger to be occupied by a department store. Two more are planned. The buildings are lined up on both sides of a tree-planted pedestrian mall. Vast areas of parking space are on the outside of the buildings, which generally have double fronts. In May, 1954, there were six shoe stores, four women's clothing stores, three variety stores, two department stores, two men's clothing stores, a bank, a dry cleaners and laundry, a newsstand, a shoe repair shop, real estate office, camera shop, barber shop, children's shop, bakery, beauty shop, supermarket, candy shop, sewing center, drugstore, insurance office, jewelry store, post office, loan agency, and telephone company employment office. Seven additional shops planned to open in July-August, 1954; a large department store was to open in the Spring of 1955. The Fairless Hills Shopping Center is located on the southern edge of Fairless Hills, adjacent to Levittown on the Oxford Valley Road (Levittown Parkway), and in May, 1954, included the following shops and offices: supermarket, shoe repair, dry cleaner and laundry, bakery, State Store, post office, beauty shop, children's shop, candy, shoes, men's clothing shop, hardware, newsstand, department store, barber, bank, mortgage broker, automobile club, three insurance agencies, loan company, and Audit Division of U.S. Steel. In addition, twenty to twenty-five additional shops are planned. Insofar as the record shows, there is no manufacturing or wholesale trade in Levittown or Fairless Hills —only retailing in both locations.

33. In Levittown there is one daily newspaper published locally: *The Bucks County Press. The Levittown Times* was started as a local daily paper, but was later merged or absorbed by the *Bristol Courier*, and is now published as the Levittown Edition of the *Bristol Courier*, at Bristol, Pennsylvania. Another locally published newspaper, the *Levittown Advance*, was started and later ceased publication. As noted in paragraph 17, *supra*, there are no standard broadcast stations located in Levittown or Fairless Hills.

* * *

CONCLUSIONS

* * *

8. There were no questions raised as to the community where Mercer Broadcasting Company proposes to serve. Trenton, with a population of 128,009, is the central city of Trenton Urbanized Area and has many industries, retail and wholesale establishments, hospitals and other facilities. With respect to Levittown-Fairless Hills the Examiner concluded, after discussing in some detail past Commission decisions concerning the term "communities" used in Section 307(b) of the Act, that "although not legally incorporated as political entities, [they] are constituted essentially the same as incorporated communities, with a shopping center, residential section, post office, and local civic groups."[30] Mercer opposes this conclusion on two principal grounds which are: 1) that Section 307(b) does not apply to this case because Levittown and Fairless Hills are not "communities" within the meaning of Section 307(b), and

30. Initial Decision, page 19, paragraph 14.

2) that as a matter of public policy Levittown must be denied the status of a "community" under 307(b) because of the exclusion of Negroes.

9. Explaining the first of these arguments in greater detail, Mercer asserts that there are no "precedental decisions" by the Commission which resolve this question since previous cases, including those cited by the Examiner, did not involve unincorporated communities. Mercer insists that Section 3.30(a) of the Rules, which states in applicable part that "each standard broadcast station will be licensed to serve primarily a particular city, town, or other political subdivision which will be specified in the station license," makes clear the meaning of Section 307(b) and demonstrates that the test to be applied is whether the location has the characteristics of "ordinary American incorporated cities." According to Mercer, the Examiner's conclusion that Levittown and Fairless Hills meets the test "is arbitrary and capricious" because it "ignores the fact that the two locations are, admittedly, 'dormitory suburbs' of Philadelphia and Trenton; that the record does not reveal how many local civic groups are located in Levittown and Fairless Hills (only the number in entire Bucks County); that Levittown's inhabitants have rejected incorporation as a city; that these dormitory suburbs were built respectively by single housing development companies; that qualified persons may not start and carry on commercial enterprises without Company consent; that the residents of Levittown must maintain and use their homes in the manner prescribed by Levitt and Sons, Inc.; that O'Keefe could not even submit the boundaries of the alleged 'communities' although requested to do so by the Examiner and the Broadcast Bureau Counsel; and that no Negroes have been permitted to live in Levittown by the Levitt Company and none now live there."[31]

10. There is no hard-and-fast rule by which it can be judged whether a particular population grouping is to be classified as a community for the purposes of making the choice required by Section 307(b); this the Examiner has made clear by her reference to Huntington Broadcasting Co., 6 RR 569, 572. More recently, in our decision in Gulf Beaches Broadcasting Co., 8 RR 476, 501 et seq. the Commission had occasion to discuss once more the problems involved. Examination of these and other cases in which the "community" question has arisen shows that all of the relevant facts in each case must be weighed before a valid answer can be forthcoming.

11. At the outset we may dispose of the suggestion that the fact of incorporation or nonincorporation of the group in question is of decisive import. In numerous cases the Commission has ruled that the fact that an area is incorporated is not enough in itself to justify its treatment as a separate "community" for 307(b) purposes; conversely, the absence of incorporation does not compel the conclusion that a group is not a "community." The corporate status of a community is only one factor to be weighed in any 307(b) decision. There is nothing new, as Mercer seems to imply, in the idea of selecting one of several applicants on 307(b) grounds even though the community in which the winner proposes to operate is unincorporated.[32]

12. The Levittown-Fairless Hills area is located approximately 10 miles from the city limits of Philadelphia and across the river and slightly more than three miles from the Trenton city limits.[33] It contains its own civic organizations and clubs, telephone exchange, telegraph office, libraries, schools, a local newspaper, shopping centers, post offices, etc. Since it possesses these characteristics and because of its location separately from Philadelphia and Trenton, Levittown-Fairless Hills is, when all of the above described facts are considered, entitled to treatment as a separate community in terms of the 307(b) comparison to be made in this proceeding. It is possible, by over-emphasizing the negative factors relied on by Mercer, to make the argument that Levittown-Fairless Hills does not possess the attributes either of a community or a separate community. However, this conclusion could be reached only if the Commission were to take an unrealistic approach and to disregard both the newness and the somewhat unusual nature of the areas which were con-

31. This last argument will be disposed of in paragraph 13, *infra*.

32. See The Connecticut Electronic Corp., 5 RR 469, in which the applicant proposing to serve an unincorporated village was selected on the basis of need for a local transmission facility.

33. It may also be noted that Levittown and Fairless Hills are not situated in areas which the 1950 U.S. Census defines as the Philadelphia or the Trenton urbanized areas.

structed since 1950 as residential communities. The fact that they are a particular kind of community, i.e., residential or, as Mercer puts it, "dormitory suburbs," does not prevent their being treated separately from Philadelphia and Trenton for 307(b) purposes. If the various negative factors upon which Mercer relies are carefully examined it will be noted that most of them stem from the newness, as well as the residential character, of the community, and most of them are deficiencies which may be expected to exist during the early developing and growing period when all of the attributes of older and more conventially established communities have not been acquired. It has not been suggested, nor can it be surmised from the facts, that O'Keefe is using the Levittown-Fairless Hills location as a device for obtaining a grant the ultimate aim of which would be to provide an additional service to either Trenton of Philadelphia. The relevant facts all establish that the intention of this applicant is to provide service to and for the Levittown-Fairless Hills community.

13. The assertion that as a matter of public policy Levittown must be denied the status of a "community" under Section 307(b) because of the exclusion of Negroes presents a different question. Mercer maintains that a grant to O'Keefe would be "contrary to the policy of the Constitution of the United States (Fourteenth Amendment) against exclusion and segregation of Negroes." Apparently in reference to Levittown, Mercer avers that the community consists of a housing development "which has excluded Negroes by fiat of the builder and where no Negroes live, whereas incorporated cities, as political subdivisions of the States may not exclude Negroes by law under the Fourteenth Amendment of the Constitution." Thus, the argument continues, it would be contrary to public policy for the Commission to promote segregation by granting the O'Keefe application.

14. Even if it were to be assumed that the facts are correctly stated by Mercer, the Commission does not see how a policy of segregation would be fostered by the authorization of a local broadcast outlet in the area. No allegation has been made that O'Keefe would operate his station in a manner to encourage such a policy. Aside from this, however, there is no record evidence to support the assertion that the developers of Levittown had a policy of not selling houses to Negroes.[34] Although there is evidence to indicate that no Negroes dwell in the community, the sample deed and the copies of the recorded covenants which are a part of the record are devoid of any racial restrictions. Certainly under these circumstances, if not otherwise, the Commission would be venturing far afield were it to accept as a ground for refusing 307(b) consideration to the O'Keefe proposal the contention made by Mercer.

* * *

25. In view of the foregoing and upon consideration of the entire record of this proceeding, it is concluded that public interest, convenience and necessity would be served by a grant of the application of Drew J. T. O'Keefe, Jack J. Dash, and William F. Waterbury and a denial of the application of Mercer Broadcasting Company.

IT IS ORDERED, This 8th day of May, 1957, that the application of Drew J. T. O'Keefe, Jack J. Dash, and William F. Waterbury for a construction permit to establish a new standard broadcast station which would operate on 1490 kilocycles with a power of 250 watts for unlimited hours of operation at Levittown-Fairless Hills, Pennsylvania, IS GRANTED, and that the application of Mercer Broadcasting Company to establish a standard broadcast station on the same operating facilities at Trenton, New Jersey, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Jane Morris
Secretary

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34. The magazine article in which the existence of such a policy was referred to was properly excluded by the Examiner.

PUBLIC ACCOMMODATIONS
Private Clubs—New York

The Chairman of the New York Commission on Intergroup Relations has recommended to the City Council that facilities of the New York Athletic Club not be used by the Council for publicly sponsored occasions. The request arose from charges of racial and religious discrimination practiced by the club.

December 28, 1956

The Honorable Abe Stark
President, The City Council
City Hall
New York 7, New York

Dear Mr. Stark:

As you may recall, Councilman Earl Brown announced last July 10 that he would not attend the annual outing of Councilmen and City Hall reporters at Travers Island, on the grounds that the New York Athletic Club, which owns Travers Island, "discriminates against Jews and Negroes on its track team because of their religion and race."

Subsequently, this Commission received a similar complaint from a highly responsible private agency and further inquiry from your office.

The incident received widespread publicity in the press, and two spokesmen for the New York Athletic Club were cited:

1. Mr. Alfred Foster, who admitted that the club has no Jewish or Negro athletes on its teams. He also admitted that it has no no Negro members, but said there were some Jewish members.
2. Mr. John F. X. Condon, who was quoted as saying "nothing in our constitution prohibits Negroes or Jews from membership." "However," he added, "we have no Jews or colored athletes on our track teams period. Who established that policy, if it is a policy, I do not know."

In an effort to determine whether or not such a policy or practice exists at the New York Athletic Club, this Commission contacted Mr. M. M. Soubrian, President of the Club, on August 29 and again on October 2, and offered him the opportunity to correct or revise the published statements. He has chosen, to date, to let it stand.

We have studied this matter further, including interviews with a number of responsible people who have been familiar with New York Athletic Club practices over a period of years. Our findings compel us to conclude that Councilman Earl Brown's charge is substantiated.

Not only are such practices damaging to the American ideal of sportsmanship, but also are inconsistent with the declared policies of the city whose name the New York Athletic Club bears. Public Law No. 55, which established this Commission declares that "prejudice, intolerance, bigotry and discrimination and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundations of a free democratic state." The law defines "discrimination" as "any difference in treatment based on race, creed, color, national origin or ancestry and shall include segregation." It further charges this Commission to investigate complaints of "discrimination against any person, group of persons, organization or corporation, whether practiced by private persons, associations, corporations and, after consultation with the Mayor, by city officials or city agencies." Therefore, it is the recommendation of this Commission that, until such time as the New York Athletic Club makes known to us the existence of a policy of nondiscrimination based on race or religion, city officials discontinue their use of New York Athletic Club facilities for any publicly sponsored occasions. It is further suggested that New York City review its relations with the New York Athletic Club to determine whether the city provides the club with any official accommodations or facilities, and to discontinue any such privileges, if they exist.

Sincerely yours,

Herbert Bayard Swope
Chairman

EMPLOYMENT
Fair Employment Laws—Pennsylvania

The Erie, Pennsylvania, Community Relations Commission has issued a resolution concerning the placing of advertising for employment. The resolution interprets the Erie Fair Employment Practices ordinance as not permitting such advertising for "situations wanted" to include references to race, color or religion.

February 24, 1956

ERIE COMMUNITY RELATIONS COMMISSION RULING ON "SITUATION WANTED" ADVERTISING

As a result of inquiry concerning the applicability of the Erie Fair Employment Practice Ordinance to situation wanted advertising the Erie Community Relations Commission has adopted the following ruling:

WHEREAS, the purpose of the Erie Ordinance #14-1954 states in part,—discrimination in any form due to race, color, creed or national origin . . . has been and will continue to be detrimental to the health, welfare and safety of the City of Erie and its inhabitants.

WHEREAS, it is the purpose of the City of Erie in enacting Ordinance #14-1954 to establish the public policy and practice of employment on merit without regard to race, color, creed, national origin or ancestry.

WHEREAS, it is the responsibility of every citizen to respect and uphold the laws of the City of Erie and,

WHEREAS, the public advertising by persons seeking employment which designates race, color, religion, nationality or ancestry is contrary to the intent of the Fair Employment Practice Ordinance,

WHEREAS, such ads placed the actual or potential employer in the position of considering the factors of race, color, religion, nationality or ancestry in the selection of employees,

WHEREAS, such advertising places the advertising media used, in the position of aiding and abetting acts contrary to law,

NOW, therefore, the Erie Community Relations Commission according to its authority under Ordinance #14-1954, Section 5-e, does hereby rule that such advertising is contrary to the intent of the Erie Fair Employment Practice Ordinance and is, therefore, discriminatory. (This ruling does not apply to those situations exempted under the Ordinance; that is, fraternal, sectarian, charitable or religious organizations, domestic servants, or persons employed in personal and confidential positions.)

(s) Roger H. Sharpe
Chairman

EMPLOYMENT
Government Contracts—Federal

Vice President Nixon, as Chairman of the President's Committee on Government Contracts, in May, 1957 wrote to twenty-six federal agencies which award contracts requesting firm enforcement of the "nondiscrimination" clause in government contracts (see 1 Race Rel. L. Rep. 459). The text of the Vice President's letter:

The Nation has made encouraging progress in eliminating racial and religious discrimination in work done under Government contracts since President Eisenhower established the Committee on Government Contracts in August 1953. Your agency shares in the credit for these gains.

Despite this progress, however, much remains to be done. Discrimination because of race, religion, color or national origin must not occur in the performance of Government contracts. The Committee believes that there should be even greater advances under the program in the future. Looking to that end, the Committee is of the opinion that where education, con-

ciliation, mediation and persuasion do not bring the proper results, a firmer approach should be adopted.

Consequently, the Committee requests your agency, in determining whether a prospective contractor is responsible and accordingly eligible to receive the award of a contract, to consider whether the contractor has an employment record which indicates that he will be able to conform to the requirements of the standard nondiscrimination clause.

The Committee also requests your agency, in determining whether an existing contractor is responsible and accordingly eligible to receive additional awards of contracts, to deny awards, as appropriate, upon determination by your agency of clear and convincing evidence of noncompliance by Government contractors with the standard nondiscrimination clause. Awards of contracts, of course, should be resumed upon receipt of satisfactory evidence that corrective action has been taken by the contractor.

I want to take this opportunity to thank you again, on behalf of the Committee, for your continued contributions to the National program to insure economic equality for all of America's people.

s/ Richard Nixon

EMPLOYMENT
Government Contracts—Federal

The President's Committee on Government Contracts sponsored a conference on "development of training incentives for the youth of minority groups" which was held in February, 1957. Parts of the report of that conference are set out below.

[*Message from the President*]

"The swift development of scientific knowledge with its application to business and industry brings new opportunities and responsibilities to our Nation. The maintenance of our security and our standard of living depends upon the full use of all our people at the highest level of their capabilities. This requires training in the latest techniques for our entire manpower, of all minority groups. In this great nationwide task, the Government shares responsibility with education, business and industry, organized labor and civic organizations."

DWIGHT D. EISENHOWER

Introduction

The President's Committee on Government Contracts is charged with the elimination of racial and religious discrimination in employment on work done under Federal contract. In carrying out its obligations under Executive Orders, the Committee has examined the components of job discrimination.

Whereas company policy regarding hiring and all other employment factors is most often the bar to equal job opportunities, the failure of a large number of minority group workers to seek or acquire the maximum training within their individual capacities likewise contributes substantially to economic inequities.

In an effort to resolve the training problem, the Committee, with the cooperation of the American Personnel and Guidance Association, held the Youth Training-Incentives Conference. Leaders of industry, commerce and organized labor, and superintendents of public and parochial schools and their chief guidance officers attended from sixteen cities having large minority-group populations.

Local Action Needed to Stimulate Youth

Speakers at the Youth Training-Incentives Conference emphasized the responsibility of leaders of individual communities for the development of programs to stimulate more of the youth of minority groups to train for skilled employment. The essential elements of such programs were described as:

- Action by businessmen and local labor leaders to provide all youth with more op-

portunities for employment and for apprenticeship and on-the-job training;

- Dissemination of information about expanded job opportunities as widely as possible among members of minority groups; and,
- Programs in the schools to convince the youth that new opportunities await them and to persuade them to take appropriate training.

The urgency of developing these programs was stressed by all speakers.

The fundamental principles of Democracy, the Nation's position as a leader in the free world, its security and defense, and its continued prosperity were cited as factors which require that our manpower resources be developed to the highest possible skill and utilized to their fullest capacity.

Nation's Prosperity, Defense Affected

The manner in which the Nation deals with its minority groups "is not a private matter whose effects are limited to people of our own land," Brig. Gen. David Sarnoff, Chairman of Radio Corporation of America, declared. "We are confronted with the challenge of proving by results rather than by rhetoric, how firmly we believe in the American dream and the American promise of equal opportunity."

Secretary of Labor James P. Mitchell predicted that although the Nation's labor force would be "numerically adequate" in 1965, "it will not be adequate in other ways" unless early and effective efforts are made to increase the proportion of skilled workers. The impending shortage of skilled workers is as critical as the threatened national shortage of engineers, research scientists, and other highly educated personnel, he said.

The defense and security of the Nation are involved because these shortages retard progress in work on atomic energy, electronics, and missile development. Our prosperity is dependent upon skilled workers to meet the growing demands of continued industrial expansion.

Youth Unaware of New Opportunities

Special efforts were declared necessary to acquaint the youth of minority groups with the increase in job opportunities because the majority of them still are influenced by past employment patterns. Although these patterns are changing, knowledge of the changes are not now reaching young people in a way to encourage them to strive for higher goals.

"Not one out of twenty" young Negroes in a typical industrial community "has the faintest idea of the vast variety of jobs that are held by members of his own race, or of the much greater variety that can be held if training is acquired," said Lester B. Granger, Executive Secretary of the National Urban League.

The Negro child "grows up in a family and neighborhood where, because of a long history of discrimination," the knowledge and information about work opportunities, which are "day-to-day living for members of the majority group, are unknown quantities to him," according to Dr. Clifford P. Froehlich, President of the American Personnel and Guidance Association.

New Job Openings Key to Incentives

There have not been enough job opportunities for Negroes "and consequently not enough of them prepare themselves for skilled work," according to Secretary Mitchell. "Thus, when better jobs do become available to Negroes, not enough of them are qualified. It is a vicious circle."

General Sarnoff called on industry to expand job opportunity "so there will be incentive for a man or woman to prepare for a high-level position" and Secretary Mitchell asked industry and labor to introduce nondiscrimination policies "not only in hiring, but also in apprenticeship and on-the-job training."

The need for elimination of discrimination in apprenticeship training also was stressed by Boris Shishkin, Director of the Department of Civil Rights of AFL-CIO. "The discrimination in training has to be eliminated at the same time as discrimination in employment," he said. He declared that the AFL-CIO "is dedicated to a civil rights policy which is forthright * * * which is binding on the organization and all of its national and international affiliates."

Publicity Urged for Job Equality Policy

Leaders of business and industry have primary responsibility for developing and disseminating information about expanding job opportunities for members of minority groups. General Sarnoff

asked them "to publicize the job opportunities that are available and spread the word about anticipated needs."

Job orders filed with the National Urban League "provide an inspiration" for the Negro youth to seek higher training, "whether or not they can be filled for the present," Mr. Granger revealed. "That is why it is important for management to continue to reiterate its policy of fair employment."

Secretary Mitchell said many members of minority groups are reluctant to apply for a job with a specific company unless they know in advance that they will not be rejected because of their race. He said there "is little chance that the applicant who stays away for fear of a rebuff will ever learn that he is welcome, or even learn that there is a vacancy." He asked employers to notify all recruitment sources of their Equal Job Opportunity policy.

Three Cities Report Incentives Programs

Programs which have been started in Chicago, Cincinnati, and Detroit were seen as guides for other cities throughout the Nation in their effort to stimulate more of the youth to seek higher training.

The approach through the opening of new job opportunities was illustrated by speakers from Detroit. William Stirton, representing the Automotive Tool and Die Manufacturers' Association of Detroit, reported Negro candidates are now being interviewed for apprenticeship positions and that qualified applicants will be referred for employment "on the same basis as any other applicant."

Russell Leach, President of Local 155 of the UAW in Detroit, reported that "our people are ready * * * to welcome their Negro brother into the plant."

An educational and public relations program by the Chicago Association of Commerce and Industry is persuading local employers that manpower needs "must be met through programs of merit employment," according to Thomas H. Coulter, Chief Executive Officer of the Association.

Cincinnati authorities also are assembling "success stories" of individual members of minority groups to serve as inspiration for other youth of the same groups.

Local Job Surveys Stimulate Training

Local projects to better acquaint the youth of minority groups with job opportunities now opened to them in Chicago, Cincinnati, and Detroit were described by speakers from those cities.

Chicago's job survey, being conducted by the Association of Commerce and Industry, "should be a great stimulant to our nonwhite population," according to Mr. Coulter, because the lists of job opportunities will be accompanied by job descriptions. Such information has greater "motivational impact" on the students "if they know we are not talking about careers in general, somewhere in America, but about specific careers and specific openings available locally," said Dr. Kenneth Lund, Assistant Superintendent of the Chicago public schools.

Leaders of business, industrial, and professional groups in Cincinnati are being formed into an advisory committee on training of the youth for job opportunities that are now available and those that can be foreseen in the future, according to Dr. Claude V. Courter, superintendent of the Cincinnati public schools. He said that school authorities expect that these advisors "will be most helpful in opening many doors of opportunity to worthy and qualified" members of minority groups. Such advisory groups, he said, "can be more effective than we can be * * * as they apply to the manpower in educating employers generally on the facts situation in our economy."

Detroit business and industrial leaders have cooperated with the school system there in the preparation of a booklet, "Exploring Greater Detroit," to acquaint students at the fourth-grade level of job opportunities for which to plan. Detroit guidance and counseling personnel encourage students to review their career objectives at least twice each year in order to revise their scholastic programs to accommodate changes which may have occurred in their goals as a result of wider knowledge of careers open to them, according to Dr. Samuel M. Brownell, superintendent of the Detroit public schools.

Committee Pledges Follow-up Program

The fact that there were almost one million fewer youth enrolled in the Nation's high schools in 1950 than 10 years earlier "highlights the

vital nature of the responsibilities of our schools today in developing to the fullest the abilities of our limited crop of young people," Dr. Courter declared.

The American Personnel and Guidance Association is planning a "strenuous effort to promulgate and promote adequate standards" for training counselors, Dr. Froehlich said. "All counselors need assistance at this time in assessing their roles with minority youth," he said.

School authorities in both Chicago and Cincinnati have developed in-service training programs for teachers. Detroit is developing a program under which a counselor goes into a plant to "spend a full month working in that industry to get a first-hand idea" of the job opportunities and job requirements.

Vice President Richard Nixon, in closing the conference, said that the staff of the President's Committee would be in touch with conferees later, "in your local communities, to see what follow-up steps you have taken * * * to see what programs are instituted in the schools * * * within industrial concerns, and in the labor unions that are represented. * * * We will also see to it that there is disseminated from time to time information about any additional experience that might be helpful throughout the country."

* * *

The cities represented at the Conference were Atlanta, Baltimore, Chicago, Cincinnati, Cleveland, Detroit, Indianapolis, Kansas City, Mo., Los Angeles, Louisville, New Orleans, New York City, Philadelphia, Pittsburgh, St. Louis, and Washington, D. C.

Reference materials furnished to members of the Youth Training-Incentives Conference included:

"Manpower and Education," by the Educational Policies Commission of the National Education Association.

"The Negro Potential," by Eli Ginzburg, published by Columbia University Press.

"Discrimination Costs Too Much," by Boris Shishkin, reprinted from the AFL-CIO American Federationist.

"Education—An Investment in People," by the Education Department of the Chamber of Commerce of the United States.

The Committee's Third Annual Report.

A pamphlet describing the American Personnel and Guidance Association.

Materials available from the Committee, without cost, include:

"Commencement," a 20-minute, 16-mm. sound motion picture.

"Equality at Work," a 30-minute television program which includes "Commencement" and comment by Vice President Richard Nixon, Chairman of the Committee.

"The Story of the President's Committee on Government Contracts," a pamphlet describing the Committee's objectives and methods of operation.

"Mr. Executive—Seven Questions," a leaflet designed for business leaders.

The annual reports of the Committee.

RACE RELATIONS
Committee Reports—Maryland

The annual report of the Maryland Commission on Interracial Problems and Relations for 1956, issued in January, 1957, describes that agency's activities in education and conciliation in connection with interracial relations in that state. Parts of the report follow:

* * *

Introduction

Our Commission to date is one of at least eighty such commissions or committees serving in 23 states. These commissions on human relations, community relations boards or interracial committees, as they are variously named, are created by local ordinance (or, as in Philadelphia, by charter). They

consist of boards of from nine to forty-five members with annual budgets ranging from token sums to $167,000. Their statutory mandate is to promote better inter-group relations. Although ordinances differ widely in spelling out subsidiary functions, these agencies have no supoena power, and depend on conciliation, research and education as their means of operation.

These councils throughout the country have, of course, varied in effectiveness, tending to reflect the sincerity of the municipal or state administration. Some councils apparently exist only to act as buffers for the Executive, shielding him from community protest, and as official excuse for lack of government action. But the overall impression of these councils is that of earnest and increasingly more effective effort to mobilize the community to wipe out prejudice and discrimination. A quote from the address by the Honorable Theodore R. McKeldin, Governor of Maryland, delivered at the Philadelphia Fellowship Commission Membership Enrollment Dinner in April 1956, would certainly indicate the sincerity of Maryland's Chief Executive.

"Because the State of Maryland lies below the Mason and Dixon Line men from Maine cannot see it as anything but a southern state. Because it lies above the Potomac, men from Mississippi cannot see it as anything but a northern state. Both are wrong. It is a border state. Skeptics say this means that it belongs to neither, but Marylanders say it means that it belongs to both.

"The position of a border state is not always a happy one. In great crises it may mean being caught between the upper and the nether millstones, in danger of being ground to powder.

"But, by the way of compensation, moments come when the border state may, if its wisdom is sufficient to the task, act not as the dividing line, but as the connecting link between regions of our common country. This I count as a happy circumstance for he who has the opportunity to act as mediator between brethren is fortunate among men."

This quote from Governor McKeldin's address certainly points out Maryland's unique national status as it pertains to its geographical dilemma. It further indicates rather generally the responsibility of this Commission and the important role it must play in intra-state group relations for some time to come. Admittedly, progress has been made in improving inter-group relations in our Free State. Yet, only a beginning has been made and many of the obstacles to complete equality loom as large as ever. It is questionable whether the current agitation for civil rights legislation in itself or of itself can serve as a "cure-all." Certainly recent legislation and court rulings would indicate that something else is needed. It might well be that greater effort should be directed toward education and conciliation as a means of bringing the rights of a minority into a more acceptable focus for the majority.

One conclusion may be drawn with some confidence—group relations have been the last fortress of the doctrine of laissez faire. Long after resort to legislation to curb existing evils had been taken for granted, the theory survived that discrimination was not susceptible to this kind of treatment. The past decade has been the death blow to that theory. Opponents and proponents of legislation will still argue about the form which laws should take. One task is not with the large majority who in the foreseeable future will accept the fact that our democratic government will not tolerate oppression, but rather we must strive to point out to those persons the necessity of attaining excellence through equality. With this accomplishment, we can realize our great ideal of wholesome inter-group relations.

In the five years that this Commission has been in existence under its current operation, it has rendered a valuable though unsung service to the State. Noteworthy, among its achievements are two very fine studies which have reflected just credit due the citizenry of this State for the selection of its representatives in government. The Baltimore Community Self-Survey entitled, *"An American City In Transition"* has had national and international circulation and acclamation. The publication entitled, *"Desegregation In The Baltimore City Schools"* has been given the same circulation and has been used as a guide in several counties of this State to solve problems growing out of their school integration process.

There have been many, many instances where this Commission has been active in conciliation and in education which have been previously reported in our Annual Reports. Some are as follows:

State Parks and Recreation
School Desegregation
Allegations of Police Brutality
Local Trends in Race Relations

Hotel Policy
Equal Employment Opportunity Ordinance

It is anticipated that a continuance and expansion of the operation of this Agency will provide for greater service to the State of Maryland.

NOTE: Hereafter the term *Commissions* will be used in all phases of reporting the various programs and it denotes the activity of the Baltimore Commission on Human Relations which is composed of the same membership as the Maryland Commission on Interracial Problems and Relations with these exceptions due to residence of the Commissioners herein noted:

DR. CHARLES E. CORNISH,
Dorchester County
DR. OTTO F. KRAUSHAAR,
Baltimore County

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MARYLAND COMMISSION ON INTERRACIAL PROBLEMS AND RELATIONS

STATEMENT OF GENERAL OBJECTIVES AND SCOPE OF ACTIVITIES

Statutory Authority The Maryland Commission on Interracial Problems and Relations officially has its current authorization by act of the General Assembly of 1951. The broad function of the Commission as set forth is that "the said Commission shall have authority and power to make such surveys and studies concerning interracial relations, conditions and problems as it may determine to promote in every way possible the welfare of the colored race and the betterment of interracial relations. In making such studies and surveys it shall be authorized to expend any funds which may be provided for in the Budget or otherwise made available." (The General Assembly of Maryland, Sessions of 1951, Senate Bill No. 421, Chapter No. 548, in the Annotated Code of Maryland.)

Clientele All citizens of the State of Maryland and its environs.

Objectives

1. To establish through an educational program a better understanding of the varied facets of Maryland's population
2. To encourage and facilitate wise adjustments to social problems and opportunities
3. To study and analyze the nature and causes of prejudice in Maryland and make recommendations for improvement
4. To study the extent and evils of discrimination based on race, color or creed as practiced in Maryland
5. To study the socio-economic status of the colored people with the view to suggest areas for improvement
6. To study the barriers to public and higher education
7. To publish the findings and recommendations in time for the annual Sessions of the Legislature
8. To provide for mediation through conference and conciliation
9. To study the efforts and results of projects in other states, the objectives of which have been to better interracial relations

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Public Accommodations Program

This area of Commission activity is defined as working with those agencies of the community which are engaged in rendering services to the general public. These are essentially commercial establishments providing goods and services on a profit-making basis; additional aspects of community services are included among other programs, particularly the one concerning health and welfare services. We are dealing here with an extremely large variety of commercial establishments; but for purposes of convenience and facility the program has been focussed upon a few major types: hotels, restaurants and taverns, theaters and amusement centers, and department stores. Not only are these the principal purveyors of goods and services to the public, but they are likewise the sensitive area of public life around which issues of racial discrimination have long existed. Thus, they provide a logical and necessary point of concern in this general effort to assess the status of State inter-group practices.

An important characteristic of the public establishments is that they are part of the great market-place which is at the heart of State life and process. Large segments of the public are in daily contact and association through the necessity of refurbishing needs of food, clothing and recreation. Therefore, they are not merely profit-making enterprises, they are public institutions in a fundamental sense. More than any other aspect of State life perhaps, these estab-

lishments provide the stage for current and daily race relationships. In the setting of the marketplace, these relations are informal and impersonal, but the important thing is that they give character to what may be the dominant and unique quality of intergroup relations of a given State. The policies and practices which public accommodations establishments maintain in Maryland with respect to the Negro public indicate considerable discrimination which provokes racial tensions and dissatisfaction.

The Baltimore Community Self-Survey published in 1955 by these Commissions revealed the following statistical data which, though dealing with Baltimore City, would certainly reflect a pattern which exists in greater degrees of discrimination throughout Maryland's twenty-three counties.

Policies of Public Accommodations Establishments as to Acceptance of Negro Trade

	All Establishments	*Hotels*	*Restaurants*	*Dept. Stores*	*Theatres*
Excluded or segregated	91%	100%	75%	20%	97%
Accepted (unqualified)	9%	0%	25%	80%	3%

Hotel Situation

During the year 1956 the Commission continued to receive written complaints that Negro delegates to national conventions had been refused room accommodations in downtown Baltimore hotels where the conventions were to be held; and therefore the conventions were moved to other states. An instance of this is the Mid-Eastern Conference of the United Community Chests and Councils, which was scheduled to be held in Baltimore on February 8, 1957. All arrangements had been made when suddenly, in November of 1956, the people in charge of the Conference cancelled all reservations and moved the convention to Buffalo. This is simply an example of what has happened.

The hard core of resistance in breaking down discrimination in Baltimore hotels is the Hotel Association. This Association refuses to appreciate the fact that in other border cities such as Washington, Pittsburgh, Cleveland and St. Louis, progress has been made in doing away with discrimination without interfering with the profitable management of the hotels. It is difficult to understand why the Hotel Association draws the conclusion that Baltimore is different from these other border cities. On the one hand the City of Baltimore and such organizations as the Greater Baltimore Committee have evolved definite plans for a new Civic Center, so that the City will be more attractive to large conventions, and on the other hand the Hotel Association is tying itself to a policy of discrimination which will prevent large conventions from being held in Baltimore. It does seem that the Hotel Association could work with and not against the rest of the City.

During the year the Commissions made various efforts to sit down and discuss the matter with representatives of the Hotel Association. The requests, however, for such interviews were rejected by the Association, which simply stated that they had nothing further to discuss with the Commissions, and that their minds were closed insofar as lifting race barriers were concerned. The Hotel people took the position that they refused to make even a partial compromise as a beginning, such as admitting members of teams representing individual cities in the American Baseball League. Baltimore is the only city having a major leage baseball team where Negro members of teams are not welcome as guests in the City's hotels.

One major event did occur. A Resolution was introduced into the City Council in the summer of 1956, simply asking that the whole matter of discrimination by the Baltimore hotels be investigated. A hearing was held on this Resolution in the latter part of 1956, at which Mr. William C. Rogers, Sr., chairman, stated the attitude of the Commissions. Mr. A. J. Fink, representing the Hotel Association and the Southern Hotel, appeared before the Council and made the statement that as far as he was concerned, if the Council passed a Bill making it illegal to refuse service to an individual patron because of race, the Southern Hotel would comply with the Ordinance and would not attempt in any way to evade the spirit of the law. At the conclusion of the hearing, the Committee of the Council requested Mr. Fink, representing the Hotel Association, to have the Association confer with members of the Interracial Commissions to explore whether some compromise could be made. The City Council implied that unless some such agreement could be made within sixty days, an Ordinance would be submitted to the Council which would make refusal of

service on the grounds of race illegal. As of January 1, 1957, the Commissions have arranged for a meeting with Mr. Charles D. Harris, the attorney for the Hotel Association, and have requested that Mr. Harris bring with him to the meeting some of the interested members of the Association.

During the interim, the full Commissions met with Governor Theodore R. McKeldin and outlined the following approach:

1. That the Commissions meet with Mr. Harris and officials of the Hotel Association on January 16, 1957, and make every possible effort to effect a compromise.
2. That the Commissions make a full report to the Public Relations Committee of the Baltimore City Council as to just what has transpired.
3. That unless a satisfactory arrangement is made with the Hotel Association, a small committee of the Commissions should meet with Mayor Thomas D'Alesandro, Jr., and urge his support of an Ordinance to open the hotels.
4. That the Commissions take any other steps that might be helpful in having the City Council introduce and pass such an Ordinance.

* * *

The Commissions enter 1957 with the firm resolve to make every effort within their power to convince the Hotel Association as to the injustice of the kind of discrimination being practiced, and at the same time, to use their influence to have the City Council pass an Ordinance which would resolve the present situation.

Restaurants

If one were to take a prolonged look at the developments during the past year in this area of public accommodations and service, a picture of status quo emerges.

The Commissions have made conscientious efforts since the turn of the year to discuss racial discrimination in public eating places with officials of the Maryland Restaurant Association. On December 8, 1955, the Commissions wrote Mr. Nathan Herr, President of the Maryland Restaurant Association requesting that a representative attend its December 14, 1955 meeting to discuss the feasibility of restaurants catering to all citizens solely on the basis of individual merit without fear of harm to their operations. This communication was not answered. On January 3, 1957, a registered letter was sent to Mr. Herr which resulted in a call from Mr. Norman Friedman, Chairman of the Legislative Committee of the Maryland Restaurant Association. Mr. Friedman stated that he would contact Chairman William C. Rogers in the very near future relative to this invitation. He further stated that it would be impossible to attend the January 11 meeting of the Commissions, but would try to arrange to comply with their request shortly thereafter. Repeated attempts to communicate with Mr. Friedman have failed to establish contact. The Commissions, in their attempt to meet with representatives from the Restaurant Association, are of the opinion that the Association officials are unwilling to discuss this matter with them. Throughout the year other attempts to arrange for conferences have failed to produce results. It is felt by the members of the Commissions that progress cannot be made through continuation of this kind of approach. Accordingly, contacts were made with individual restaurant owners.

Perhaps the most significant of these would involve the discussions with, and correspondence to, Mr. Miles Katz, President of the White Coffee Pot Restaurants. In May 1956, the Commissions wrote to Mr. Katz welcoming him as a tenant in the Mondawmin Shopping Center. This communication expressed the Commissions desire that Mr. Katz's shop at Mondawmin would avail its facilities and services to persons of all races and that the same considerations would be made in terms of employment. Receipt of this letter was never acknowledged. In pursuance of this request and prior to the formal opening of the Mondawmin Corporation, efforts were again made to have the White Coffee Pot of Mondawmin establish an all-inclusive policy at that particular shop. Several conferences and exchanges of communications also were forwarded to, and made with, the management of the Mondawmin Corporation regarding this matter. The Commissions report, however, that as of this date the White Coffee Pot Restaurant will not serve Negroes and is the only restaurant in the Mondawmin Center which persists in maintaining a discriminatory policy of this kind. Conferences with Mr. Katz point out the need for legislation which would make it unlawful to discriminate against persons because of race in public eating places in the City of Baltimore

and the State of Maryland. The White Coffee Pot Restaurants, Inc. have stated very definitely that they would welcome this kind of legislation although the Commissions have been unable to make progress through the Maryland Restaurant Association.

We are happy to note and privileged to commend the following restaurants which have adopted policies of non-discrimination and will serve all persons regardless of race: Sun Ray Drug Company in the Mondawmin Shopping Center; Howard Johnson's Restaurant on Pulaski Highway; The Yellow Bowl Restaurant, 1234 Greenmont Avenue; Y.W.C.A. dining rooms; The Coffee Shop of the Central Branch Y.M.C.A.; the Snack Shop of the Young Men's Hebrew Association; Manhattan Drug Store, Monument Street and Rutland Avenue; Ansell's Pharmacy, St. Paul and Madison Streets, and perhaps countless others whose policies have come about quietly and have not been publicized.

Recommendation

It appears necessary and highly desirable that legislation should be enacted in this area which would make it possible for private management to change existing policies and practices to conform to the democratic processes which are prevailing in other areas of day-to-day living.

Theatres

As a result of action taken by a social action committee of Northeast Baltimore, the Commissions attempted to bring together representatives of said committee and the management of the Northwood Theater. This social action committee was composed of students attending several colleges in the Northeast Baltimore area who were desirous of gaining the right to attend the Northwood Theater. Requests from this group to the management of this theater relative to a change of policy which would permit Negro patrons to attend had been rejected. After attempts to confer on this matter and to bring about a possible change, this committee began to picket the theater.

Several civic groups in the area appealed to the Commissions to look into this situation and make every effort to bring the groups concerned together in conference. As a result of these requests, the Commissions communicated with Mr. Irving Grant on December 16, 1955, and asked if he and his brother would meet with a committee to discuss this matter. Mr. Grant agreed to such a meeting under one condition—that Dr. Martin D. Jenkins, President of Morgan State College, would be in attendance. The members of the Commissions could not see any possible reason for the involvement of Morgan's president inasmuch as the social action committee was not a recognized body on Morgan State's campus, and that the makeup of said group involved students from other colleges in the area. Dr. Otto F. Kraushaar, President of Goucher College and a member of the Commission, advised the Commissions that involvement of Dr. Jenkins was totally unnecessary. As a result of the decision on the part of the Commissions to eliminate the consideration of Dr. Jenkins' participation in the conference, further attempts to arrange for a meeting with the owners of the Northwood Theater were unsuccessful.

A series of communications and contacts were made, and on March 19 the following persons met in Chairman William C. Rogers' office to discuss the Northwood Theater situation: Mr. Irving Grant, Mr. Joseph Grant, Commissioner Otto F. Kraushaar and two representatives of the social action committee. This conference clearly pointed out (1) that the Grant brothers feared a loss of business if they admitted Negro patrons; (2) that the residents of the Northwood area are opposed to integration, as evidenced in responses from the Northwood Improvement Association and the Hillen Road Improvement Association when they met with the Commissions several months previous to this meeting; (3) that if other theaters in the area would agree to operate on an integrated basis, no one particular theater owner would suffer a loss of business.

Accordingly, the Commissions directed their Executive Secretary to arrange a conference with owners of these theaters in the Northeast Baltimore area:

Arcade	Rex
Boulevard	Earle
Cameo	Senator
Harford	Vilma
Northwood	Waverly
Paramount	

The initial meeting date was scheduled for April 4, later rescheduled for April 18, and again scheduled for April 20. Unfortunately, only one theater owner, Mr. Fred Perry, Cameo Theater, found it convenient to attend either of these

scheduled meetings. Individual contact then followed and those conferences indicated that three theater owners are willing to change their policy if the majority of the owners will do likewise. Three owners involving five theaters in this area were definitely opposed to a change of policy at this time. Three theater owners representing four theaters in this area were unavailable for comment. In general, those in favor and those opposed felt that a change of policy would result in a financial loss to them unless the change was made by all of the owners involved.

Recommendation

The Commissions feel that a public accommodations act either on a Statewide or municipal level should be enacted making discrimination of this kind unlawful. Such would serve to provide the kind of legal support to those theater owners who desire to make policy changes, and would further extend the privileges of using these public accommodations to all citizens.

Social Welfare Program

In this area, hospitals, convalescent homes, welfare institutions, family and child care agencies and group work and recreational agencies are considered for the purpose of discovering their policies in regard to admittance, participation, and employment of Negroes and members of the Protestant, Catholic and Jewish religious groups. Many discussions and conferences have been held during the year to determine the changes that have come about relative to the aforementioned, and to encourage the official boards of these institutions to change discriminatory policies and practices wherever they exist.

In an effort to determine what steps to take relative to the accomplishment of these objectives, the members of the Social Welfare Committee held a luncheon meeting last spring to which representatives of the various group work and recreational agencies were invited. The concerns of the members of this Committee were discussed with those present, and brought about the reporting of current status of each of these organizations relative thereto. An outgrowth of this meeting pointed toward the need for more specific information and it was felt that this could be best secured through the distribution of a questionnaire to the same agencies polled in the Community Self-Survey. Other meetings were held with representatives of family and child care agencies, professional medical groups, and with representatives of the Baltimore Hospital Council. The "next" steps in each instance appeared to be very similar, which provide for securing of additional information, adopting of programs of education, and the holding of conferences directed toward bringing about changes of policies which presently exist.

The following needs have been very clearly shown in all of the conferences and indicate (1) that additional hospital facilities are sorely needed in Baltimore City and throughout the State of Maryland; (2) that additional trained and qualified personnel are needed to staff existing institutions in this area; (3) restrictions limiting the educational opportunities of Negroes and members of certain religious faiths must be abolished so as to provide equal opportunities for learning in these professions; (4) considerations for board membership must be based on sound democratic principles so as to afford adequate representation of all groups.

Employment Program

Most of our activities in this area may be centered around the Summary Findings of the Employment Committee of the Baltimore Community Self-Survey which reveals the following: "The Negro labor force in the Baltimore labor market is being utilized far below its maximum ability potentials. The facts reveal that most Negroes are employed in menial positions; that those few who are employed in managerial positions are in plants and organizations where the labor force under their control for the most part is all-Negro; that opportunity for advancement through on-the-job or apprentice training, promotion into better jobs requiring more skill, and the utilization of their latent talents are generally denied them. These forms of systematic discrimination persist even though the facts, as reported, show that their general educational attainments are not far below that of the general population and their efficiency on the job and relationships with others on the job are good. This under-utilization in an area of expanding industrial activity is causing an impairment in the purchasing power of those affected, resulting in a serious economic loss to the community."

It was strongly recommended by the Employment Committee, and we quote, "that the parties

involved—employers, unions, educational institutions and government—re-examine their employment policies and practices as they relate to Negroes and other minorities and intensify their efforts to employ and utilize these groups on the basis of their educational attainments, their qualifications, and the skill they can attain if given the opportunity, without regard to their race, religion or national origin."

Every activity herewith has been geared to the aforementioned recommendation which was based upon a factual study of the section. The activity has not been as strenuously promulgated as it might have been due mainly to the fact that Baltimore has had an FEP Law since July 18, 1956, and it is felt that in this area, our efforts may well be coordinated with the FEP Commission when it begins operation. However, the activities may be clearly indicated through a close study of these accompanying statistics:

PERCENT OF FIRMS EMPLOYING (ONE OR MORE) NEGROES BY OCCUPATIONAL LEVELS

	Percent*		
Occupational Level	*Before World War II*	*During World War II*	*After World War II*
Non-Managerial Professional	1.6	1.2	1.8
Managerial and Supervisory	2.0	2.3	2.5
Sub-total	3.6	3.5	4.3
Clerical and Kindred Workers	6.0	6.7	8.9
Sales Workers	1.6	1.9	4.3
Sub-total	7.6	8.6	13.2
Foreman	9.6	11.4	10.0
Skilled	17.9	18.5	19.4
Semi-skilled	41.4	43.3	45.8
Sub-total	68.9	73.2	75.2
Service Workers	47.8	48.8	52.7
Laborers	58.2	59.0	53.9
Sub-total	106.0	107.8	106.6
No. of firms Reporting	251	254	391

*Since a firm may employ Negroes in more than one category, percentage figures may exceed 100.

Housing Program

Early in 1956 it became increasingly apparent to the Commissions that the in-migration of Negro families into formerly all white neighborhoods was becoming the most troublesome area of friction between the races. Numerous complaints were received at our office from home owners and also from officers of improvement associations about the unscrupulous real estate dealers who were buying up properties in certain neighborhoods and putting in undersirable tenants with a view to frightening the residents into selling their properties at panic prices.

After conferences with officers of various improvement associations the Commissioners became convinced, since there was no legal means of deterring the real estate dealers from their offensive and highly lucrative practices, our only avenue of approach was to educate the white citizens as to the best means of protecting their property values and preserving their neighborhoods.

Accordingly the Commissions issued a statement on "Block-Busting" which was released to the press and which was given wide circulation among improvement associations.

The Baltimore Commission on Human Relations requested a hearing before the Housing Committee of the City Council for the purpose of pointing out legislation which might be helpful in deterring so called "Block-Busting" . . . The Hearing was held on April 28 and two suggestions were made by the Commission:

1. That an ordinance be passed making it mandatory for the seller of a property to acquaint the buyer with the zoning regulations governing that property before completing the sale. (Cases had been called to our attention where a purchaser had acquired a property with the understanding that he could break it up into four (4) apartments only to discover that after the sale that it was in a zone where two (2) apartments were the maximum allowed.)
2. That the regulations governing density in the Hygiene or Housing Code be tightened up in order to decrease density, which is the primary cause of neighborhood deterioriation rather than the in-migration of Negroes per se.

Evidence mounted that tension and hostility were increasing in areas where the white residents were unwilling to accept Negro neighbors. The Commissions appointed a special committee on Housing composed of the following leaders in the community.

Mrs. John B. Ramsay, Jr., *Chairman*
Mr. Morton Hoffman, *Co-Chairman*
Miss Frances Morton
Mr. Francis Jencks
Mr. Edgar M. Ewing
Mrs. William Chambers
Mr. Ellis Ashe
Rev. Levi Miller
Dr. Daniel Wilner
Dr. G. James Fleming

Mr. Arthur Sherwood (FHA)
Mr. Pleasonton L. Conquest, III
Dr. Paul Meier
Dr. Charles Edwards

This committee met for the first time on May 16 and promptly set up a plan for a Luncheon conference on "What Needs to be Done about Changing Neighborhoods," to be held at the Y.M.C.A. on June 14. Each of the improvement associations in the city was invited to send delegates to this conference. Eighty-three persons attended some of whom were representing city departments and civic organizations and some of whom were representing improvement associations. The speakers were Mr. James W. Rouse, who described the overall problem and the need for a reasonable and intelligent approach to it and Mr. Pleasonton Conquest, III who is President of the Mt. Royal Improvement Association, (the first improvement association in Baltimore to be fully integrated), who explained on the basis of experience what can be done when Negro and white residents work together on their mutual aims, namely the preservation and improvement of the neighborhood. It was also emphasized again at this meeting that the Commissions stood ready to send speakers to Improvement Association meetings and/or Board meetings and to help in any way possible to minimize friction.

In July the Housing Committee met to evaluate the June Conference and to draw up plans for a more comprehensive conference in the Fall. Meantime, the North-East Intergroup Council had scheduled a series of four (4) meetings in September and October—on September 24, October 3, October 11, and October 18—in which several members of our Committee had been invited to participate as panelists. We therefore decided to postpone our Conference until October 31 and to have it in three (3) sessions. The morning session at which the speakers were Mr. Morton Hoffman of the Housing Authority of Baltimore City, Mr. Morris Milgrim, President, Concord Park Homes, Inc. of Philadelphia and Dr. George Snowden, Minority Group Housing Advisor of the Federal Housing Administration, was devoted to exploring what was being done about changing neighborhoods in other cities.

At the luncheon session the speaker was Mr. James Scheuer, Chairman, Executive Committee of the City and Suburban Homes, and Vice President of the First National Capital Redevelopment Corporation, who exposed the fallacy of the assumption that neighborhood deterioration is caused by the in-migration of Negroes rather than by the habits and attitudes of the people themselves, irrespective of race.

The afternoon session featured a panel of representatives of improvement associations who described the particular problems in their neighborhoods and asked for help in solving them. The entire audience participated actively, in some cases offering constructive suggestions and in some cases posing additional problems. This session proved so helpful because of the free interchange of ideas that the Housing Committee has decided—rather than plan additional big meetings—to set up conferences between the boards of improvement associations and members of the Housing Committee on an informal round table basis. Two such Conferences are scheduled before the end of 1956.

Education Program

Education for purposes of the Commission is divided into two groups: public and private. In the State of Maryland, public education provides for approximately 72% of the educable population, 28% being cared for through private institutions of learning. With the Supreme Court's Ruling of May 17, 1954, and the immediate implementation of said Ruling by the Baltimore City Department of Education being affected generally in a rather smooth manner, the attention of this Agency has been directed toward service to the Counties of this State. This service has been limited because of the desire of all County Boards of Education to handle this matter on a local basis so as to combat problems which are peculiar to their own counties. Nevertheless, the Commission serves as an Agency ready to assist whenever called upon for such assistance. It has made available to all the Boards of Education and to all of the private institutions of learning a very comprehensive and definitive study of the desegregation process in the Baltimore City Schools. As may be evidenced by a knowledge of situations in several Counties, there is a great need for assistance from this Agency working jointly with the State Department Board of Education and local County Boards of Education to bring into fruition the fullest implementation of the Supreme Court's May 17, 1954 Ruling relative to public education.

Baltimore City has made rapid strides toward integrating its schools, as may be evidenced by the following statistics:

TOTAL NET ROLL, OCTOBER 31, 1956

	White	*Colored*	*Total*
Elementary—(Kindergarten, Grades 1-6 and Opportunity Classes)	53,752	47,033	100,785
Secondary	30,573	16,130	46,703
Vocational (including Occupational and Shop Center)	3,758	3,750	7,508
GRAND TOTAL	88,083	66,913	154,996

The number of Negroes in formerly all-white schools in Baltimore is now double the number in the 1955-56 school year.

In a statement for *Southern School News* commenting on desegregation's effect to date, Dr. John H. Fischer, Superintendent of Public Instruction, says "On the basis of our experience it seems clear that by desegregating our schools we have substantially improved the educational opportunities of Negro children without reducing in any way those available to white children."

Of the 794 schools in Maryland counties, Baltimore City excluded, 138 now have mixed enrollments, or 17% of the total. Three of the desegregated schools are new ones which opened on a mixed basis. The remainder are formerly all-white schools. This means that 21% of the county schools that were all-white prior to a year ago now have mixed enrollments.

Because the number of Negroes in any one school is small, 89,929 white pupils are in schools that contain one or more Negro pupils, while only 1,727 Negroes are in mixed schools. Thus, 40.6% of white county pupils are in desegregated schools this year, while only 4.2% of Negro county pupils have left all-Negro schools to attend mixed ones.

* * *

RACE RELATIONS
Committee Reports—Massachusetts

The 1956 annual report of the Massachusetts Commission Against Discrimination, Public Document 163, 1957, details the Commission's activities in the administration of several civil rights statutes. Parts of the report follow:

Introduction

Probably the most important happening this year for the Massachusetts Commission Against Discrimination is the acquisition of a new duty. On August 10, 1956, the Fair Educational Practices Act, formerly administered by the Department of Education under the directorship of Dr. Franklin P. Hawkes, was transferred to the MCAD. This now places all legislation dealing with discrimination if it applies to employment, education, places of public accommodation or public housing under the jurisdiction of this Commission. On September 1, 1956, Dr. Clarence P. Quimby, well known educator, was appointed as Field Representative in charge of Fair Educational Practices. He will carry on the duties previously the responsibility of Dr. Hawkes.

The Fair Educational Practices Act covers all educational institutions with the stipulation noted below:

"It is hereby declared to be the policy of the Commonwealth that the American ideal of equality of opportunity requires that students, otherwise qualified, be admitted to educational institutions without regard to race, color, religion, creed or national origin, except that, with regard to religious or denominational educational institutions, students, otherwise qualified, shall have the equal opportunity to attend therein without discrimination because of race, color or national origin. It is a fundamental American right for members of various religious faiths to establish and maintain educational institutions exclusively or primarily for students of their own religious faith or to effectuate the religious principles in furtherance of which they are maintained. Nothing contained in this act shall impair or abridge that right."

This year, as in former years, more complaints have been made alleging discrimination in employment than in any other field. The law now covers in employment any discrimination based

upon race, color, religious creed, national origin, age or ancestry. There have not been as many cases based on alleged employment discrimination because of age as had been expected. The major help the Commission has afforded our senior citizens is in curbing "age advertising." The whole tone of advertising in the classified sections of Metropolitan newspapers has changed since the passage of the age amendment which provides that there must not be any specification of age either directly or indirectly before hiring. Ads still appear mentioning age directly or indirectly but they are relatively few. Before the age amendment was passed there was in employment advertising such an emphasis on youth that the conclusion might have been reached that anyone over forty was unemployable. Now the general public seems to be realizing more fully that age and energy do not always equate and that experience and general maturity are often highly desirable qualities in an employee.

Cases based on alleged discrimination in places of public accommodation have increased slightly in the past year. Encouragingly surveys and checks on advertising materials reveal increasing awareness of the law which provides that places of public accommodation must afford equal treatment.

A real change is evident in new public housing developments and this improvement has happened solely as the result of a cooperative effort of the Housing Authorities and the Commission. As yet, only one case has been brought charging discrimination in this area.

Many people fail to realize that the Commission operates at three levels:

1. Enforcing the Law

When a case is brought by an individual or his attorney, it is assigned to one of the Commissioners and a Field Representative. The Field Representative interviews people, studies records and eventually reports the facts which he discovers to the Investigating Commissioner who calls the interested parties into conference and tries to settle the matter on an informal basis. If necessary, the Commission has the power to subpoena. If a matter cannot be settled in the conference period it is referred to the other two Commissioners for a hearing which may be public or private.

2. Investigations

An investigation deals with a situation which does not begin with a complaint from an individual, but it must relate to instances where trouble is manifest that can be traced to the factors of race, religious creed, national origin, age or ancestry and so is of concern to the Commission. In other words, the Commission recognizes what it considers to be a danger signal and tries to straighten out the matter in a cooperative manner. The information which triggers the investigation may come from a reputable source or agency or may be an incident involving an organization exempted from the provisions of the statutes. Under such circumstances the Commission invites people to a conference stating the reason for such an invitation. At no time has such an invitation been ignored. The majority of such conferences are successful but failures are not unknown.

3. Education

The educational program attempts to acquaint the general community with the work of the Commission to the end that public understanding, sympathy and support may be stimulated and the services given by the Commission may be made clear.

The Commission has been fortunate and also challenged in dealing with the most interesting material in this world—human nature. How that challenge has been met appears on the next few pages.

A List of Civil Rights Statutes Administered by the Commission

Chapter 368 of the Legislative Acts of 1946 brought into being the original Fair Employment Practice Commission as well as the Fair Employment Practice Law, Chapter 151B of the General Laws.

AMENDMENTS

Chapter 479 of the Legislative Acts of 1950 changed the name of the Commission to its present one, Massachusetts Commission Against Discrimination, and also increased the scope and jurisdiction of the Commission by placing within its province the administration of the

Public Accommodations Statute and the Public Housing Statute.

Chapter 697 of the Legislative Acts of 1950 increased the scope of the fair-employment practice statute to include age, defined as 45 to 65.

Chapter 437 of the Legislative Acts of 1953 further defined a place of public accommodation, resort or place of amusement.

Chapter 274 of the Legislative Acts of 1955 provided that any person seeking a bond or surety bond conditioned upon the faithful performance of his duties shall not be required to furnish information as to his race, color, religious creed, national origin or ancestry in applying for such a bond.

Chapter 334 of the Legislative Acts of 1956 provided for the transfer of the jurisdiction to enforce the Fair Educational Practices law from the Board of Education to the Massachusetts Commission Against Discrimination.

* * *

SELECTED CASE HISTORIES

1. *Color Discrimination in Employment. Case No. XI-25-C*

The complainant applied for employment to the respondent. She was asked her qualifications and then given an employment application form to complete. On completion of the application form she was informed that no openings were available and that she would be notified regarding work in about two or three weeks. During the course of the interview, the interviewer suggested several times that the complainant seek employment elsewhere. The interview was terminated with the same suggestion.

After having applied to the company three times without success, the complainant charged the respondent with unlawful discrimination against her because of her color.

Investigation of the complaint revealed that the respondent's employees were numbered in the hundreds. Although there were colored persons living in the same community and surrounding area, none were employed. The complainant had applied for a production job. The rate of turnover in production averaged approximately 5 to 6% per year, according to respondent's records.

A review of company records revealed that there were more than 200 applications on file. The person in charge of the application forms stated that very few colored persons applied for employment and the complainant was the only colored applicant she could recall.

A review of the application forms revealed that the complainant's card was so marked that it was distinct from others in the file. It was also dated three months after the complainant stated she applied.

In a ten month period, following the date of the complainant's initial application and during which period she re-applied three times, more than 130 persons were hired. 92 of the persons hired were new. A sampling of these indicated that two thirds of them did not have previous experience. The figures appeared to indicate that respondent had an employee turnover somewhat higher than that stated.

Respondent's representatives steadfastly denied that the complainant was discriminated against because of color. It was pointed out that the complainant had not been given an opportunity to take the required examination which was a prerequisite to employment.

At an informal conference held at the offices of the Commission, the personnel director for the respondent stated that application forms are held in the file for about one year. All hiring is done from the application file.

It was further pointed out to the personnel director that the complainant was the only known colored applicant to have an application on file and that her application was the only one marked differently. The personnel director stated that the mark had no significance. However, the personnel director was informed that the employment pattern of the respondent did indicate that no Negroes were employed despite information from respondent's representatives that a few had applied.

At the request of the investigating commissioner, the complainant was reinterviewed and given the test. The Commission was informed that she had passed the required test and her application was placed in the active file.

During final negotiations, the complainant notified the Commission that she had found suitable employment elsewhere and was no longer interested in working for respondent.

2. *Age Discrimination in Employment. Case No. AVI-1-A*

The complainant, a woman aged 56, applied for light assembly work at the respondent company, in answer to a newspaper advertisement. She was informed by the personnel manager

that the company did not have a job which she could do. She asked for an opportunity to prove her ability and was told that her employment application form had supplied sufficient information.

In a prior interview, the personnel manager stated she would be hired if she passed a manual dexterity test. She completed the test and was informed by the person administering it that she had passed with the "highest possible mark." She contacted the company a number of times in person and by telephone. Each time she was informed there was no employment for her.

The complainant charged the respondent company with discriminating against her in denying her employment because of her age.

Investigation revealed that the respondent company employed several hundred persons. The rate of turnover of employees was approximately ten per week. Members of minority groups were employed in various capacities. Records used prior to employment conformed to the law.

According to the personnel director, a number of jobs had been vacant since the complainant's original application. However, these jobs were in production and the complainant, he indicated, was not qualified for such work.

Investigation of company records revealed that in the period since the complainant's application to the date of her complaint to the Commission, a period of five months, 100 female employees had been hired in production. The majority of the new production employees were recent high school graduates without previous experience.

A review of the complainant's employment application form and record revealed that she had six years' experience in production work including one year in a similar industry.

The personnel director denied that he had told the complainant that if she passed the manual dexterity test she would be hired. He added that all applicants, except former employees, must take the test before being considered for employment.

He denied that the respondent discriminated against the complainant because of her age, pointing out two present employees, one 41 and another 45. He insisted that the work at his plant required good eyesight, dexterity, and in some instances was tedious and dangerous. Therefore, due to the nature of the business, the majority of the employees were young girls.

The respondent's representative stated that the complainant's age was not the reason for denying her employment. He added that he would re-interview the complainant and attempt to place her with the company.

The following day, he contacted the Commission stating that he had interviewed the complainant and found her to be a very satisfactory prospect and that he would attempt to employ her.

A short time later the complainant wrote the Commission stating that she had been employed by the respondent. She added that she was very pleased with the position she held.

3. *Color Discrimination in a Place of Public Accommodation. Case No. PVI-8-C*

The complainant entered the respondent barber shop for the purpose of having his hair cut. The barber on duty informed the complainant that he did not know how to cut his type of hair. The complainant then left the premises. He filed a complaint with the Commission charging the respondent with discriminating against him because of his color.

During the investigation the owner of the respondent shop said that he was the person who talked with the complainant. He added that he had not refused to cut the complainant's hair, but had told the complainant that he did not know how to cut it. He added further that after having been so informed, the complainant said, "all right" and left the premises. He did not create any trouble.

The respondent explained that he had never cut the hair of a colored person, but if the complainant had insisted he would have received a hair cut. When asked if it was customary for any customer to insist on having his hair cut, the respondent replied that such a problem had never arisen.

When asked if the complainant or any other colored person would receive service if they entered the shop, the respondent replied that he would inform him that he had never cut the hair of a colored person, but he would cut his hair to the best of his ability, if it was desired.

He then pointed out that the complainant reported the matter to the local police and admitted to the police that he had not been denied service.

A visit to police headquarters revealed that there was no record of such a report.

On the same day, shortly after the completion of the investigation, the Commission Field Representative conferred with the complainant.

After a review of the investigation the complainant stated that the barber did not say he would not cut his hair, but twice he said, "I do not know how to cut your hair." The second time he said it, there appeared to be a tone of finality indicating to the complainant that his hair would not be cut.

The complainant, being advised by the Commission's Field Representative that the barber had said that he would cut his hair, stated that he would return to the respondent shop for a haircut.

The following day the complainant telephoned the Commission and said that he had returned to the barber shop, shortly after he had conferred with the Field Representative.

The barber was now very cordial to him, apologized for the incident which prompted the complaint, and cut his hair satisfactorily.

The entire matter, which included the investigation, review of police records, conference with the complainant and the complainant's return and receipt of satisfactory treatment, was accomplished within a five-hour period.

4. Religious Discrimination Fair Educational Practices Act. Case No. EDI-1-RC

The first complaint brought to the Massachusetts Commission Against Discrimination after the transfer of the Fair Educational Practices Act from the Department of Education was filed on August 14, 1956. The complaint came from New Jersey.

Immediate contact with the complainant revealed that she had made application to a Junior College in Massachusetts using her own name, "a commonly accepted Jewish name." The college advised her that its "quota from New York and New Jersey" had been filled. However, three weeks later when the girl's mother applied to the same college, using her maiden name, which was obviously of a different background, the college sent an application blank in reply—none had been sent in the first reply to the girl and made no reference to the geographical quota. It was contended by the father that discrimination had been directed against his daughter and that applications were not being considered upon a geographical basis but upon the recognition of family names.

A week later the Registrar of the college was visited. Explanation was made by the Registrar that vacancies did appear after June 1st and lists were presented to show that Jewish students were admitted in large numbers (20-25%). A promise was made to write the father full details and send an application blank.

The father accepted the college's explanation but the girl was no longer interested in a Massachusetts college because she had enrolled elsewhere.

During the investigation the college produced complete enrollment data. A study of this data verified the Registrar's statements. It was recommended by the Commission that:

(1) the college avoid the use of the word "quota" in correspondence relating to admission. When "geographical quota" is meant, it was suggested that "geographical distribution" might be substituted since the word "quota" had acquired an unpleasant connotation and,

(2) application blanks be sent in reply to any inquiry even if an accompanying letter explains that enrollment has been completed as of that date.

* * *

RACE RELATIONS
Commission Reports—New York

The New York Commission on Intergroup Relations, established by an ordinance of the City of New York in 1955, has rendered a report on its operations. The report, dated January 15, 1957, indicates the "target areas" of concentration by the Commission.

Commission on Intergroup Relations
A Report to the Mayor

January 15, 1957

Mayor Robert F. Wagner in his second annual report last year listed as his first goal for 1956 the fight against bias in the City of New York. He pledged "to move forward on all fronts in the battle against racial and religious discrimination and violation of civil rights, by utilizing the Commission on Intergroup Relations and all other means at our disposal with the aim of eliminating such bias from our city."

To implement the fight against discrimination, the City Council passed in June, 1955, Local Law 55, which established the Commission on Intergroup Relations as an official agency of the City, with broad powers and duties in the field of intergroup relations. In December, 1955, the Mayor appointed the fifteen members of the Commission and selected Herbert Bayard Swope as Chairman. Two months later the Commission named Dr. Frank S. Horne as its Executive Director and proceeded to recruit professional and clerical staff and lay the groundwork for a sound program to carry out the charge of Local Law 55 and the pledge set forth by the Mayor.

One of the first orders of business for the Commission was to arrange meetings with representatives of the various private and public intergroup relations agencies in the City to draw upon their long experience in the field; to seek their recommendations, and to pool this knowledge so that COIR could draw up an effective program of action.

[*Target Areas*]

As a result of two general conferences and one with groups specifically concerned with problems of the Puerto Rican Community, the Commission determined that there were several major "target areas" on which it must focus its attention if discrimination and segregation are to be eliminated. These key areas are:

1. Discrimination and segregation in the private housing market, and the trend toward a high concentration of minority families in public housing projects.
2. Educational facilities and practices which largely reflect restrictive residential patterns in the city.
3. Policies and practices of City Departments and private agencies in dealing with individuals and groups of different racial, religious and ethnic background.
4. Community relations and services to assist in neighborhood adjustments in changing neighborhoods and other tension areas.

The agencies consulted also agreed with the Commission on the supporting program role of adequate programs in action-research and public relations. In addition, consensus required that the problems faced by Puerto Rican and other Spanish-speaking citizens were to have special attention only to the degree necessary to assure that any such problems were comprehended by and integrated into the total program of the Commission. While working in close collaboration with the State Commission Against Discrimination in the areas of employment and public accommodations, it is the responsibility to "fill the gaps" not now covered by law or administrative policy.

The Commission and the agencies consulted agreed in their findings that discrimination in housing was the root problem and, as such, should receive high priority in the action program. Strengthening this contention was this announcement by the Mayor last October 12:

> "The objective of this city's policy is clearly that every resource and facility of the city and its departments be utilized in every possible way to remove from the housing supply any restrictions based on race, religion, or national origin. As a matter of morality as well as law, all New Yorkers must have the right to bargain for their shelter in a freely open, competitive housing market. Our effort is to establish the right and the opportunity of anyone to move in any neighborhood or to move to any other neighborhood, as his desire and income may dictate."

At the same time the Mayor charged this Commission to take "every step within its power to attain the cooperation of private builders, lenders and real estate interests with the city's open housing policy."

[*Open City Project*]

To reinforce this statement of policy, the Commission set up a Committee on Community Living with the Rev. Leland B. Henry as its Chair-

man. The first action by this Committee was to announce plans for an "Open City Project" designed to channel minorities into the private housing supply. This project through the combined services of public and private agencies, would provide centralized and systematic machinery for listing properties available to minority families, processing and referring potential occupants, documenting experiences, negotiating with owners and managers and resolving problems arising from minority tenant occupancy.

[*Funds Voted*]

On October 11, 1956, the Board of Estimate, in support of this project voted funds amounting to $10,000 for expert consultants to assist the Commision in setting up the structural machinery for the Open City Project. The bulk of financing, if the project is to prove successful, will have to come from support outside of city funds. The key to the whole project hinges on the ability of the Commission to enlist the cooperation of all public and private agencies interested in working for a truly "open city."

Akin to the problem of discrimination in housing is the *de-facto* segregation of schools and school facilities. Fortunately, the Board of Education had already made important strides in recognizing the problem and setting up machinery to implement the recommendations of its Commission on Integration. Soon after COIR was organized the Board of Education invited representatives of this Commission to work with its own Commission toward the ultimate resolution of the problems being faced in breaking down the barriers of segregation which had solidified over the years. Moreover, COIR was called on by civic groups to lend its assistance and influence in resolving specific problems making up parts of the whole integration action.

[*City Employment*]

Early in the formation of program and policy of this Commission it became clear that if this Commission were to successfully combat discrimination in cooperation with other city agencies, we must make certain that the city government itself is free of discriminatory practices and policies, and is exercising to the fullest its many powers to discourage such practices in the city at large. Along these lines the Commission sought the assistance of the Mayor in informing its sister agencies of its role in the city government and its availability to work with any agency seeking its assistance on problems relating to intergroup relations matters.

The reaction to the Mayor's request was immediate and genuine, with the officials of the city warmly welcoming any cooperative action that would help eliminate discrimination. The Police Department, for example, met with the Chairman and the Executive Director of COIR to offer its complete facilities in assisting the Commission in carrying out its legal obligations. Even before the formal conference, representatives of COIR working on a reported case of racial tension in the Bronx, in which the home of a Negro family was stoned, the pattern of Police-COIR cooperation had been established with the result that a tension situation was nipped in the bud and positive action towards eliminating such occurrences in the future were launched in the community.

[*Nursing Homes*]

Another outstanding example of city agency cooperation was with the Department of Welfare. Welfare Commissioner Henry L. McCarthy and his staff, working with representatives of COIR, announced early in December that they had advised representatives of the New York Nursing Home Association that the Department of Welfare will require a pledge by February 1, 1957 of non-discrimination from each nursing home accepting welfare recipients, if they are to remain on the Welfare Department lists.

This concept of denying municipal funds wherever possible to institutions, individuals or corporations practicing discrimination was also amplified when COIR recommended to the Mayor in September that the city take steps to strengthen compliance with the Local Law which bars discrimination in employment by individuals and firms holding contract with the city. A more detailed series of recommendations in this matter is being worked out with the Corporation Council's office.

The Department of Labor, taking cognizance of COIR's role in the city recommended that this Commission be involved in the appeals machinery for New York City employees who feel that their job opportunities are being limited because of their race, creed, color or national origin. The recommendations of the Department of Labor have been considered by the Civil Service Com-

mission and the Office of the City Administrator and regulations governing the participation of this Commission in such complaints are now under preparation.

[*Special Census*]

The Commission also took the lead in seeking approval by the Board of Estimate for funds to provide special census data in regard to the social and economic status of minority families resident in the city. Several municipal and private agencies indicated they had strong need for such data and asked that COIR petition the Board for funds. The special census survey will be started by the United States Bureau of Census early in 1957. Its findings will be invaluable in assisting such agencies as the Welfare Department, Department of Hospitals, City Planning Department, Department of Health, New York City Housing Authority, Youth Board, Community Mental Health Board, Community Council of Greater New York, Urban League of Greater New York and the Migration Division of the Commonwealth of Puerto Rico's Department of Labor.

One of the important areas in which COIR has established itself, is in its relationship with the community. From the onset the Commission has attempted to involve representative community groups in its over-all programming. As a result, the Commission has won acceptance by the community groups. Commission personnel were much in demand throughout the past several months as speakers, panel consultants, workshop resources and school lecturers. The demand is such that the Commission in all likelihood will formalize a speakers bureau in 1957 and produce publications and other materials for education and information of the public-at-large.

[*Experiences*]

As the Commission turns from its formative year of 1956 to the year of 1957, there are certain experiences it has learned which it believes will prove of infinite value in carrying out an effective program. Of prime significance is the recognition of the need for sanctions by law, administrative legislation and policy to bolster conciliation and negotiation in the field of intergroup relations. We have learned that the existence of law, regulation and policy creates an atmosphere for productive conciliation. The law or policy represents the manifestation of the public will, which in the eyes of the group or individual charged with discrimination, means that the law is now applicable to all alike. It gives a democratic legal endorsement to concepts which in the past were believed to be "only moral" in nature. The very fact that a law had established this Commission, makes the work of this Commission that much more effective. We have found that the policy statement in the law has become more meaningful to those with whom we deal—not because there are any penalties involved—but because the concepts contained in this policy have now become applicable to all the citizens of New York.

Therefore, this Commision, in its future actions will carefully consider both administrative policy and legislative recommendations to reinforce its efforts in breaking down barriers of discrimination and improving intergroup relations. One of the key advancements for the year 1957 will be the development of appropriate procedures and the introduction of legislation to augment the work of this Commision and other agencies in the effort to remove racial, religious and ethnic restrictions in the private housing supply. In large measure, restrictive residential living patterns constitute the major obstacle to the ultimate truly democratic pattern of living in the City of New York.

ATTORNEYS GENERAL

EDUCATION
School Taxes—Delaware

On request of the State Superintendent of Education, the Attorney General's office in Delaware has rendered an opinion with respect to the geographical and property bases of school taxes in that state. The opinion, dated April 18, 1957, concerns whether property of both Negroes and white persons must be included in the list of "taxables" of a school district. The attorney general stated that, "in any School District all 'taxables' regardless of race or color must be included in preparing the assessment list," but the problems of redistricting, implicit in the question presented because of prior separate racial districts, must be resolved by the legislature. The opinion calls attention to the recent court decisions, both in the state and federal system, which preclude racial discrimination in the public school system.

STATE OF DELAWARE
OFFICE OF THE ATTORNEY GENERAL
WILMINGTON, DELAWARE

April 18, 1957

Dr. George R. Miller, Jr.
State Superintendent
Department of Public Instruction
Dover, Delaware

Dear Dr. Miller:

You have requested an opinion with regard to a problem which has arisen in the Rose-Hill Minquadale School District #47. This School District is about to levy and collect additional taxes for school purposes and to provide funds for payment on school bonds in accordance with the provisions of Title 14, Del. C., Chapters 19 and 21.

The School District is preparing and completing the assessment list which forms the basis for the levying of school taxes in accordance with §§ 1912, 1913 and 1914, and the comparable sections under Chapter 21. § 1912 requires that the assessment list contain "the names of all the taxables of the district—". The Rose-Hill Minquadale School District #47 proposes to include all the taxables in its School District irregardless of their race or color. The question is whether or not this proposed action is proper. In our opinion the answer must be in the affirmative.

The broad question presented is whether any School District in the light of the present law must include all taxables within the School District in the assessment list irrespective of race or color for the purposes of raising additional school taxes and funds for bonds pursuant to Chapters 19 and 21.

[*No Express Distinction*]

Chapters 19 and 21 of Title 14, Del. C., have never expressly made any distinction upon the ground of race or color with respect to the "real estate in such district" or "the taxables of the district".

Prior to 1954, recognition was given to the provisions of law which required separate schools for white children, colored children, Moors or Indians. Delaware Constitution, Article 10, § 2, Title 14, Del. C., § 141(b) (c) (d). Because of these provisions, by an opinion of a former Attorney General dated April 10, 1951 relating to the Rehoboth Special School District, sections of the School Code pertaining to public education were construed to mean that negroes although within a white School District, could not be taxed by such district for local school funds; they should not be included in the assessment list; and they were not entitled to vote in an election for members of the Board of such a School District.

It is our opinion that since the specific pro-

visions of the State Constitution and the school laws of this State, which required the maintenance of separate schools based upon race or color. are now invalid as being in violation of the United States Constitution, the construction of the school laws heretofore given by the former Attorney General also must fall. The result is that the word "taxable" as used in Chapters 19 and 21 must be given its normal and plain meaning. Title 1, Del. C., § 303. Haddock v. Board of Public Education in Wilmington, et al, 84 A.2d 157, Chan. Del. 1951. Any implied distinctions or discrimination based solely upon race or color are not called for by the remaining language of the School Code and would, in any event, be invalid because of unconstitutional infirmity. It must follow that in any School District all "taxables" regardless of race or color must be included in preparing the assessment list for the purpose of levying and collecting local school taxes.

[*Numerous Decisions*]

It would seem to be unnecessary to refer to the numerous decisions of various Courts which have held that any discriminatory action by a State based solely upon race or color whether in the field of education, use of governmental facilities, or otherwise, constitutes a violation of the United States Constitution. The United States Supreme Court so declared in the well known School Segregation Cases with respect to two cases originating in the State of Delaware involving the State Board of Education and two School Districts. One case was that of Gebhart et al v. Belton et al, involving a suit against the State Board of Education and the Claymont School District. The second suit was against the State Board of Education and the Hockessin School District #29. The decision of the Supreme Court in these two cases and others was rendered May 17, 1954, 347 U.S. 483, 74 S.Ct. 686, 96 L.Ed. 873. The second opinion upon the relief to be granted in the cases was rendered May 31, 1955. 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 653.

Subsequent to the first United States Supreme Court opinion referred to, the principles laid down by that Court were followed, as they were required to be, by the Court of Chancery and the Supreme Court of Delaware in the case of Steiner v. Simmons, 108 A.2d 1753, October 14, 1954, Chancery, and 111 A.2d 574, February 8, 1955, Supreme Court Del.

[*Other Delaware Opinions*]

The unconstitutionality of discriminatory action solely because of race or color also has been recognized and followed in two additional opinions in the State of Delaware by the United States District Court for the District of Delaware in the case of Evans et al v. Board of Trustees of Clayton School District #119. The first opinion was rendered November 9, 1956, 145 F.Supp. 873, and the second opinion was filed March 6, 1957, ...F.Supp..... The Court pursuant to its opinion has ordered the filing of a plan of desegregation by the local Board within 30 days.

The many decisions to date of the United States Supreme Court, the lower Federal Courts and the various State Courts, dealing with various aspects of unconstitutional State action because of discrimination solely for reasons of race or color are collected in the *Race Relations Law Reporter*, Vol. 1, Nos. 1-6, Vol. 2, No. 1, published by the Vanderbilt University School of Law.

Our General Assembly has recognized the impact of the present state of the law. In the School Building Program Act of 1955, 50 Delaware Laws, Chapter 529, the references which had been used in prior similar acts denoting a distinction between School Districts based upon color or race were removed. It is well known that this was done to avoid questions of unconstitutionality and difficulties in the sale of the bonds as indicated by bonding counsel.

Nothing that is stated herein is to be taken as meaning that the presently existing School Districts constituting a geographical area with a given Board of Trustees or Board of Education and a given school building or buildings are to be considered as being changed, modified or in any way affected as such.

With respect to the situation underlying the request for this opinion, two lengthy conferences have been had in this office with representatives of the Board of Trustees of the Rose-Hill Minquadale School District #47, the Dunleith Community School #132, the State Board of Education, the residents of the community of Dunleith and their respective attorneys. It has been pointed out to us that because the Dunleith Community School District #132, which has

heretofore been known as a colored School District, has its geographical or attendance area practically identical with that of the Rose-Hill Minquadale School District #47 confusion will result and the taxables within the geographical area may theoretically be subjected to taxation in both School Districts. In further explanation of its action in including all taxables in its assessment list, the Rose-Hill Minquadale School District #47 emphasizes its efforts to comply with Constitutional requirements by its voluntary plan of desegregation which it has been carrying out.

[*Problems for Legislature*]

However, the various problems relating to the creation, change, merger or reorganization of School Districts is for the consideration of the Legislature. To the extent that districts may merge or change their boundaries in accordance with the procedures now provided in the School Code, particularly by Chapter 11, that can still be done. The factors showing the desirability of a general reorganization of the State's multitudinous School Districts must be directed to the General Assembly. As was pointed out by our Supreme Court in Steiner v. Simmons, 111 A.2d at 580, this is essentially a legislative task.

At the conferences between the parties above referred to, it appeared that the Rose-Hill Minquadale School District #47 has included "taxables" from the Dunleith area in the assessment list since 1951. The School District claims that the inclusion of these persons prior to July 1954 was unintentional; the "taxables" included, claim they were unaware they were paying school taxes to the District because of certain circumstances.

We give no opinion at this time with respect to this problem but call the attention of the parties to the case of Commissioners of Lewes v. Jester et al, 12 A.2d 229, Del. Chan. Sussex, (Nov. 1956), where the Court held that under the statutes and facts there involved, taxes, though erroneously paid, were not recoverable.

If we can be of any further assistance, please let us know.

Sincerely yours

s/ Herbert L. Cobin
Chief Deputy Attorney General

EDUCATION
School Funds—Virginia

The Attorney General of Virginia was asked whether public funds might validly be expended for the construction of school facilities designed for racially segregated use. The Attorney General answered that, on authority of *County School Bd. of Hanover County v. Shelton* [93 S.E.2d 469, 1 Race Rel. L. Rep. 666 (Va. 1956)], the expenditure would be valid.

COMMONWEALTH OF VIRGINIA
Office of
THE ATTORNEY GENERAL
Richmond

May 9, 1957

Honorable William A. Jones
Commonwealth's Attorney
Richmond County
Warsaw, Virginia

My dear Mr. Jones:

This is in reply to your letter of May 7, 1957, in which you state that the Board of Supervisors of Richmond County contemplates borrowing $110,000 from the Literary Fund and utilizing $50,000 from the Battle Fund for the construction of a consolidated Negro grade school for Richmond County. You request my opinion as to whether or not an expenditure of public funds for the construction of a consolidated Negro grade school would constitute an ultra vires and illegal act because of the decision of the Supreme Court of the United States in Brown v. Board of Education, 347 U.S. 483.

I am of the opinion that expenditures of public funds for this purpose would be a valid expenditure and would not constitute an ultra vires

and illegal act. I feel that the ruling of the Supreme Court of Appeals of Virginia in School Board v. Shelton, 198 Va. 226, supports my opinion on this matter, and, as of this time, the United States Supreme Court decision has no place in the determination of the validity of the expenditure of public funds for school construction.

With warm personal regards, I am

Very sincerely yours,
J. Lindsay Almond, Jr.
Attorney General

GOVERNMENTAL FACILITIES
Housing—Oregon

A bill (House Bill No. 647) has been proposed in the Oregon legislature which would, in part, prohibit discrimination on the basis of race, religion, color or national origin in housing "benefiting from public aid." The opinion of the state Attorney General was requested concerning the constitutionality of the proposed bill. The Attorney General replied that the proposed bill could be construed as being discriminatory class legislation, since it would affect only those persons receiving "public aid" in erecting housing, and might thus be held unconstitutional.

STATE OF OREGON
DEPARTMENT OF JUSTICE
SALEM

March 19, 1957
No. 3640

Honorable Don S. Willner
State Representative
Capitol Building

You request the opinion of this office on the constitutionality of House Bill No. 647 so far as it pertains to the prohibition of discrimination because of race, religion, color or national origin in certain housing. Specifically, you state:

> "The problem that concerns me particularly is whether the state of Oregon, even through a conciliation procedure, can validly draw the distinction between houses whose financing is guaranteed by F.H.A. and G.I. loans and houses which are not indirectly financed by Federal funds."

The proposed bill is for an act "Relating to civil rights; creating new provisions; and amending ORS 659.010, 659.050, 659.060, 659.080 and 659.100." Section 1 of the proposed bill provides that sections 2, 3, 4 and 6 of the act are added to and made a part of ORS 659.010 to 659.110.

ORS 659.020 (1) to which the portions of the act mentioned are added to and made a part of provides as follows:

"It is declared to be the public policy of Oregon that practices of discrimination against any of its inhabitants because of race, religion, color or national origin are a matter of state concern and that such discrimination threatens not only the rights and privileges of its inhabitants but menaces the institutions and foundation of a free democratic state."

Section 3 of the bill provides as follows:

"(1) No owner of a *housing unit* benefiting from *public aid* as defined in section 4 of this 1957 Act shall refuse to sell, lease or rent the *housing unit* to a prospective occupant or expel an occupant from the *housing unit* because of the race, color, religion or national origin of the occupant or prospective occupant.

"(2) No person shall incite or coerce an owner of a *housing unit* benefiting from *public aid* as defined in section 4 of this 1957 Act into refusing to sell, lease or rent the *housing unit* to a prospective occupant or expel an occupant from the *housing unit* because of the race, color, religion or national origin of the occupant or prospective occupant." (Emphasis supplied)

"Housing unit" is defined in section 2 of the proposed bill as follows:

"(2) 'Housing unit' means:

"(a) An apartment or living unit designed as a dwelling place for a person or family and located in a building containing two or more such apartments or units.

"(b) A building designed for occupancy as a dwelling place for a person or family and owned, operated or managed by a person who owns, operates or manages five or more other such buildings on contiguous land. For the purposes of this subsection, land is contiguous notwithstanding that it is separated by a public or private street or road."

Section 4 of the bill states that housing is considered to benefit from "public aid" if it is, or is located in, a building:

"(1) The acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan that is made, issued or guaranteed by a *governmental body*. However, upon the payment or expiration of the loan, insuring agreement or guarantee, the unit shall no longer be deemed to be benefiting from public aid; or

"(2) Which is located on land owned or assembled into a parcel by a *governmental body;* or

"(3) Which is exempt in whole or in part from real property taxation." (Emphasis supplied)

The term "governmental body" is defined to include the federal government or an agency of the federal government under subsection 1 of section 2 of the act.

Section 6 of the act provides for the filing of a complaint by the person allegedly discriminated against with the Commissioner of the Bureau of Labor. The Commissioner is required to "endeavor to eliminate the unlawful practice complained of by conference, conciliation and persuasion." (Section 7)

In the case of the Commissioner's failure to eliminate such practice he is required to serve upon the person allegedly discriminating a written notice of hearing to answer the charges of the Commissioner specified in a copy of the complaint served with the notice. (Section 8)

An answer may be filed to the allegations of the complaint: section 8 (2).

Thereupon a hearing is had in which, if the Commissioner finds that the respondent has engaged in the discriminatory practices charged, "he shall serve a certified copy of such finding on the respondent, together with an order requiring respondent to cease and desist from such unlawful practice." An appeal may be taken from such order (section 9). Criminal penalties are provided upon the wilful violation of any such order of the Commissioner: ORS 659.110; 659.990 (1).

[*Conflict With Federal Statutes*]

The first question raised by your inquiry is whether the proposed legislation would conflict with present federal legislation dealing with housing.

It is a fundamental principle of law that legislation passed by Congress pursuant to the powers delegated to it by the Federal Constitution is the supreme law of the land: 81 C.J.S., States, § 7b (2)(a) p. 871. It follows, therefore, that state legislation which conflicts with valid federal legislation cannot stand and is invalid: Amalgamated Association of Street Electric Railway and Motor Coach Employes of America, Revision 998 v. Wisconsin Employment Relations Board, 340 U.S. 383, 95 L.Ed. 364, 71 S.Ct. 359.

There appears to be no conflict, however, between the proposed law and any federal law regulating housing. The purpose of the proposed Oregon bill is obviously to prevent discrimination in obtaining housing accommodations because of race, color, creed or national origin. This purpose is clearly in accord with the purpose and content of existing federal housing legislation. See 12 U.S.C.A. 1750(b), 1750(f) and the following regulations enacted thereunder prohibiting racial restriction covenants: Code of Federal Regulations, 1949 edition, Cum. Supp. §§ 294.21, 294.26, p. 203, § 294.36, p. 204; see 12 U.S.C.A. 1709, 1715(b) and similar regulations enacted by the Federal Housing Administration thereunder prohibiting racial restriction covenants, Code of Federal Regulations, supra, § 232.16, p. 109; § 241.16, p. 130; §§ 243.19, 243.23, 243.29, p. 144. See also 38 U.S.C.A. § 694 pertaining to veterans housing. And finally, see 42 U.S.C.A. §§ 1401 and 1441 wherein it is declared to be the policy of Congress to remedy the national housing shortage and to provide a decent home and a suitable living environment for every American family.

[*Federal Agencies Unaffected*]

The proposed legislation does not impose any duties or obligations on any federal agency nor does it purport to interfere with the administration of any federal housing program. Rather, the legislation purports to govern a certain class of individuals *after* they have obtained, directly or indirectly, federal assistance in obtaining housing.

While the United States has enacted some regulations pertaining to discrimination, see citations supra, the proposed law is supplemental to such regulations and considerably broader. Further, nothing appears in said regulations or in federal housing legislation in general to indicate an intent of Congress to exclude and therefore invalidate state regulation on the same general subject of discrimination: Allen Bradley Local No. 1111, United Electrical Radio and Machine Workers of America, v. Wisconsin Employment Relations Board, 315 U.S. 740, 86 L.Ed. 154, 62 S.Ct. 820.

It is therefore my opinion that Oregon may validly include, as done in the proposed legislation, federally financed housing.

[*Validity of Classifications*]

The second question raised by your inquiry pertains to the validity of the legislative classifications made by the proposed bill under the equal protection clause of the Fourteenth Amendment to the United States Constitution and under Article I, § 20, of the Oregon Constitution. The same tests apply to both constitutional provisions: Phillips v. City of Bend, (1951) 192 Or. 143, 153.

Initially, it should be stated that the possession and enjoyment of all individual rights are subject to a reasonable exercise of the State's police power in behalf of the public welfare: 16 C.J.S., Constitutional Law, § 175, p. 897, § 182, p. 917. The right to contract with reference to and dispose of real property falls within the class of fundamental rights subject to a reasonable exercise of the State's police power: 11 Am. Jur., Constitutional Law, § 268, p. 1009, where it is said:

> "No rule in constitutional law is better settled than the principle that all property is held subject to the right of the state reasonably to regulate its use under the police power in order to secure the general safety, public welfare, public convenience and general prosperity * * *."

In the exercise of its police powers the legislature may find it necessary to resort to classification in which case the validity of such classification must meet the judicial standards imposed under Article I, § 20, of the Oregon Constitution and under the Fourteenth Amendment to the United States Constitution.

Article I, § 20, of the Oregon Constitution provides as follows:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Discussing the meaning and effect of this provision, the Oregon Supreme Court, speaking through Mr. Justice Rossman in the case of Spicer v. Benefit Ass'n. of Ry. Emp., (1933) 142 Or. 574, 588 (on motion for attorney fee) stated as follows at page 589:

> "* * * the defendant argues that the act violates article I, section 20, Oregon Constitution. That section of our constitution, based upon the conviction that in democracies discrimination by public bodies in their treatment of individuals similarly situated should not be tolerated, *prohibits class legislation.* However, whenever experience shows that an *evil arises from the activities of some specific group,* a remedy may be prescribed by legislative action, *applicable only to those who form the evil-producing group,* without violating constitutional restrictions. * * *" (Emphasis supplied)

Mr. Justice Holmes, in Patsone v. Pennsylvania, 232 U.S. 138, 144, 58 L.Ed. 539, 34 S.Ct. 281, set forth a clear and similar statement of the test for class legislation under the Fourteenth Amendment to the United States Constitution as follows:

> "* * * But we start with the general consideration that a state may *classify with reference to the evil to be prevented,* and that if the *class discriminated against* is or reasonably might be considered to *define those from whom the evil mainly is to be feared,* it properly may be picked out. * * * It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found

> that the *danger is characteristic of the class named.* * * * The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens *were the peculiar source of the evil that it desired to prevent.* * * *" (Emphasis supplied)

We turn again now to House Bill No. 647 so far as it pertains to housing. The legislature in this bill has made two basic classifications. The first classification pertains to what might be termed "multiple housing." Simply stated, the law purports to apply only to "owners" of duplexes on up and to tract developments containing six or more houses on contiguous land. (Section 2 (2)). The question then arises whether it is reasonable for the legislature to exclude from the class thus defined individual home owners, and tract owners having less than six contiguous homes.

It can reasonably be conceived that persons owning duplexes, threeplexes, apartment houses and large tracts of contiguous homes are in the *business* of leasing, renting and selling housing accommodations. It also can reasonably be conceived that the legislature has found as a fact that the evil of discrimination on racial and other grounds is *characteristic* of or is *peculiar* to this class because of the very fact that the class is primarily engaged in the business of housing.

Since the foregoing facts can reasonably be conceived, they must then be assumed to exist: Savage v. Martin, (1939) 161 Or. 660, 694, where the court said:

> "* * * The guarantee of equal protection of the laws admits of the exercise of a wide scope of discretion and avoids only what is done without any reasonable basis, and therefore is purely arbitrary. * * * The classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. * * *"

Since the facts assumed justify the first classification made, it is my opinion that that classification is valid and constitutional.

The legislature has in the proposed law, however, subclassified the class just discussed into two groups, those who receive "public aid" and those who do not. Those persons who do not receive "public aid" as defined by the proposed act are not subject to the law in any manner.

[*Public Aid*]

A housing unit benefits from public aid if (1) it receives financial assistance from the state or federal government, (2) is tax exempt or (3) is located on land owned or assembled into a parcel by the state or federal government (section 4).

So far as assistance by the State of Oregon to housing is concerned, there is no constitutional problem. If the State has the power to make land tax exempt, insure loans on housing or render other assistance to housing, then clearly the State has the power to determine as a contractual matter upon what conditions the benefits from that assistance will be used.

The State, however, has no such proprietary interest to support the subclassification made with reference to housing obtained with federal assistance. If the classification relative to federal assistance is valid, it must be supported by other reasons.

The question immediately arises, however, whether the *evil of discrimination on grounds of race, color, religion or national origin is peculiar to or characteristic of those persons who receive federal assistance in obtaining housing accommodations* but not peculiar to or characteristic of those persons who do not receive such aid. If, of course, the evil sought to be remedied is peculiar to or characteristic of the class sought to be made subject to the burden imposed by the legislature, then the classification as to that class is reasonable and therefore constitutional: Spicer v. Benefit Ass'n. of Ry. Emp., supra; Patsone v. Pennsylvania, supra.

However, to raise the question noted seems to me to compel an answer in the negative.

The legislature, in seeking to eliminate the evil of discrimination, *has indirectly sanctioned such discrimination in a class of individuals who are equally prone to discriminate and identical to the class covered by the law* with the sole exception that the class covered receives some form of federal assistance in obtaining housing.

This distinction, however, has nothing to do with the human weakness to discriminate and is not pertinent to the basic purpose of this legislation.

New York has recently enacted similar legislation. Massachusetts and Washington had

similar legislation pending which may have become law as of the date of this opinion. These facts are somewhat persuasive. Unfortunately, however, there has as yet been no judicial test of that legislation. But, again, it seems that this legislation is subject to the same question raised herein.

While I am unwilling to say that section 3 and 4 of this bill are plainly unconstitutional in view of the absence of pertinent authority and in view of the further fact similar legislation has been enacted or proposed making similar distinctions, it is nevertheless my opinion that a serious and substantial constitutional attack could be made upon the proposed law. Persons who do not receive federal assistance in obtaining housing are indistinguishable from those persons who do receive such assistance *so far as discrimination is concerned.*

Very truly yours,
ROBERT Y. THORNTON
Attorney General

By: PETER S. HERMAN
Assistant

EMPLOYMENT
Fair Employment Laws—California

The Board of Supervisors of the city of San Francisco, California, has had under consideration the enactment of a city "Fair Employment Practices" ordinance. Pending further action on the ordinance the Board requested an opinion of the City Attorney whether the proposed ordinance would conflict with similar proposed legislation before the state legislature. The City Attorney replied that, in present form, the ordinance would be in conflict with the state bill.

OPINION NO. 1158
April 23, 1957

SUBJECT: FEPC ORDINANCE; WHETHER ORDINANCE, IF ENACTED, WOULD BE IN CONFLICT WITH LEGISLATION NOW PENDING BEFORE STATE LEGISLATURE

Gentlemen:

Mr. McGrath has submitted to me your request for opinion as follows:

REQUEST

"During the consideration of the FEPC ordinance the question was raised as to whether the ordinance, if enacted, would be in conflict with legislation now pending before the State Legislature if it should be enacted.

"At the direction of the Chairman of the Committee, Supervisor Halley, both parties in the issue presented memorandums to support their respective contention.

"I have been directed by the County, State and National Affairs Committee to refer these presentations to you with the request that you submit your opinion on the question."

OPINION

In my opinion, it is quite possible that the courts would hold that the FEPC ordinance, the adoption of which you have under consideration, would conflict with the legislation now pending in Sacramento (AB 7 and AB 2000), should that legislation be enacted in its present form. (See, however, suggestions made in the last two paragraphs hereof.)

Both the ordinance and the Assembly bills contemplate the formation of commissions to hear and rule upon charges of unlawful employment practices (discrimination in employment because of race, creed or color), such rulings to

be enforced by the courts (in the case of the Assembly bills, by contempt proceedings; in the case of the ordinance by criminal proceedings and fine).

I believe there can be no doubt that the state could properly consider the matter of equality of opportunity in employment a matter of statewide concern and enact this legislation (AB 7 or AB 2000) and thus control the matter on a statewide basis. If such legislation is enacted, it would be a state affair and state law would prevail over a local ordinance in the matter.

With reference to conflict, our local commission would, so far as the cases which are brought before it, detract from the State commission's exercise of its jurisdiction. Or, if cases filed with our local commission were filed concurrently or subsequently with the State commission, the possibility of conflicting orders might arise. Punishment might be meted out pursuant to our local ordinance in a case where the State commission found no violation, or vice versa.

The principles applicable in determining whether our local ordinance could stand are clear. They are: If the State legislation was intended by the Legislature to cover the entire field, local legislation is invalid. If the Legislature did not intend to cover the entire field, a local ordinance supplementary to the State legislation is valid. A conflicting ordinance is invalid. (Pipoly v. Benson, 20 Cal.2d. 366)

A study of AB 7 and AB 2000 indicates to me an intent that the State legislation shall cover the entire field. Frequently State legislation makes provision for adoption of local ordinances on the same subject. These bills do not.

Section 1433 of AB 2000, which provides that,

> "Nothing contained in this act shall be deemed to repeal any of the provisions of the civil rights law or of any other law of this State relating to discrimination because of race, religious creed, color, national origin or ancestry,"

in my opinion has reference to other State statutes as distinguished from city or county ordinances.

If the Legislature does intend that cities may set up their own fair employment practice commissions, it can easily so provide. Until it does so, my view of AB 7 and AB 2000, in their present form, is that local commissions operating in the same field as the State commission are not contemplated.

Were the Assembly bills amended to recognize the propriety and legality of local commissions and to provide that a person filing charges before the State commission could not proceed in the same matter before a local commission, and vice versa, the legislative intent would be clear and the possibility of conflict would be removed.

In conclusion it may be pointed out that even in matters of state-wide concern, local legislation is permissible until a State statute has occupied the field. Thus, should this ordinance be enacted, it would be perfectly valid and effective until State legislation is enacted. And it would be effective after such enactment provided the State Legislature did not intend to occupy the entire field, and, on the contrary, intended that local nonconflicting legislation should subsist.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: BOARD OF SUPERVISORS
235 City Hall
San Francisco 2

Attention: Mr. John R. McGrath
Clerk of the Board

EMPLOYMENT
Fair Employment Laws—Kansas

In response to an inquiry by the Executive Secretary of the Kansas Anti-Discrimination Commission, the Attorney General of Kansas stated, on March 20, 1957, that a bona fide charit-

able hospital was excluded from the provisions of the Kansas Act Against Discrimination by its terms. The inquiry concerned the application of the employment discrimination provisions of the act.

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL
TOPEKA, KANSAS

March 20, 1957

Mr. Malcolm B. Higgins
Executive Secretary
Anti-Discrimination Commission
Mills Building
Topeka, Kansas

Dear Malcolm:

This will acknowledge your letter of March 19, 1957, in which you make the following inquiry:

> "Would a charitable hospital, operated by a non-sectarian corporation or organization be an 'employer' under the terms of the Kansas Act against Discrimination?"

In reply thereto we wish to advise you that it is our view that the charitable hospital described by you would not be an employer within the meaning of the Kansas Act Against Discrimination. Section 44-1002 of the Act provides in part:

> ". . . The term 'employer' includes any person in this state employing eight (8) or more persons, and any person acting directly or indirectly for an employer as herein defined, and labor organizations, nonsectarian corporations, and organizations engaged in social service work, and the state of Kansas and all political and municipal subdivisions thereof, except school districts and educational institutions, but shall not include a nonprofit religious, *charitable*, fraternal, social, educational, or sectarian association or corporation."

If the hospital about which you inquire is a bona fide charitable hospital, we believe it would be included in the exemption in the statute quoted above.

Very truly yours,

/s/ John Anderson, Jr.
Attorney General

CONSTITUTIONAL LAW
State Police Powers—Texas

The Attorney General of Texas was requested to furnish to a committee of the State Senate an opinion with respect to the constitutionality of a proposed bill (H.B. No. 239, 1957). The bill would require the registration of all persons or bodies who advocate racial integration or segregation or who engage in litigation on behalf of racial integration. The Attorney General stated that the proposed legislation would violate the freedom of speech and press guaranteed by the state and federal constitutions.

THE ATTORNEY GENERAL OF TEXAS
Austin 11, Texas

May 21, 1957

Honorable Wardlow Lane, Chairman
State Affairs Committee
Texas Senate
Austin, Texas

Opinion No. WW-140
RE: Constitutionality of
House Bill No. 239

Dear Senator Lane:

Your letter dated May 7, 1957, and received in this office on May 10th, requests an opinion as to the constitutionality of House Bill No. 239 now pending before the State Affairs Committee of the Senate.

The caption of said Bill recites a purpose "to promote interracial harmony and tranquility and to that end to declare it to be the public policy of the State that the right of all people to be secure from interracial tension and unrest is vital

to the health, safety and welfare of the State." Section 1 of the Bill recites that it is "the duty of the government of the State to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils and violence which would result from interracial tension and unrest and possible violations of the laws of Texas."

Section 2 of the Act requires registration with the Secretary of State of "every person, firm, partnership, corporation or association, whether by or through its agents, servants, employees, officers, or voluntary workers or associates who or which":

> 1. Engages as one of its principal functions or activities the advocating of racial integration or segregation, or
>
> 2. Whose activities opposing or favoring segregation of races cause or tend to cause racial conflicts or violence, or
>
> 3. Who or which is engaged or engages in raising or expending funds for the employment of counsel or payment of costs in connection with litigation in behalf of *racial integration color;* (Emphasis added).

Section 2 further provides:

> ". . . that nothing herein shall apply to the right of the people peaceably to assemble and to petition the government for a redress of grievances, or to an individual freely speaking or publishing on his own behalf in the expression of his opinion and engaging in no other activity subject to the provisions hereof and not acting in concert with other persons."

Section 3 sets out in detail the information that shall be supplied with such registration.

Section 4 makes the registration records on file in the Secretary of State's Office open to public inspection.

Section 5 prescribes penalties for violation of the Act.

Section 9 of the Act provides:

> "Sec. 9. This Act shall not apply to persons, firms, partnerships, corporations or associations who or which carry on such activity or business solely through the medium of newspapers, periodicals, magazines or other like means which are or may be admitted under United States postal regulations as second-class mail matter in the United States mails as defined in Title 39, 224, United States Code Annotated, and/or through radio, television or facsimile broadcast or wire service operations. This Act shall also not apply to any person, firm, partnership, corporation, association, organization or candidate in any political election campaign, or to any committee, association, organization or group of persons acting together because of activities connected with any political campaign."

Although the Bill in question has been popularly referred to as a so-called "segregation" measure, it is noted that its provisions, generally, apply alike to those advocating either "racial segregation" or "racial integration."

We think it clear, despite the presence in both Sections 2 and 9 of provisions limiting the effects of the Bill upon freedom of speech and freedom of press, that the Bill in question places certain restrictions and burdens upon the exercise of these two basic freedoms as guaranteed by both the State and Federal Constitutions.

The primary question before us is whether the Bill may be upheld as a legitimate exercise of the police power of the State. It is well established in both our State and Federal law that the constitutional guarantees of freedom of speech and of the press do not deprive the State of its right to enact laws in the legitimate exercise of the police powers, and pursuant to such power, reasonable regulations of speech and press may be adopted in order to promote the general welfare, public health, public safety and order, or morals. 16 C.J.S. 1111, Sec. 213(7). The question with which we are here concerned is not whether the Legislature has such *power*, but whether the *means* which it has employed conflict with either the State or Federal Constitutions. Dennis v. United States, 1951, 341 U.S. 494.

The general rule with reference to the authority of the State to restrict freedom of speech and of press, has been stated as follows:

> "The power of the State to abridge freedom of speech and of the press is the exception rather than the rule, and the Legislature may not, under the guise of the police power, arbitrarily or unnecessarily interfere with the freedom of speech and of the press, nor may the Legislature prevent the fair use of the opportunity for free political discussion, to the end that government may

be responsive to the will of the people and that changes may be effected through lawful means. A State may not suppress free communication of views, religious or other, under the guise of conserving desirable conditions. . . . The fundamental right to speak cannot be abridged because other persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if rights are exercised. Speakers may not be prohibited from speaking because they may say something which will lead to disorder." 16 C.J.S. 1114, Sec. 213(7) and cases there cited.

The case of Ex Parte Meckel, (Crim. App., 1919) 220 S.W. 81, concerned the constitutional validity of a so-called "Disloyalty Statute" enacted by the Texas Legislature during World War I. Transposing the phrases of the Act, the court stated that the pertinent provisions thereof would read:

> "If any person in time of war, in the presence and hearing of another person . . . use any language . . . which language . . . is of such nature as that in case it is said in the presence and hearing of a citizen of the United States, it is reasonably calculated to provoke a breach of the peace, such person shall be guilty of a felony, etc. . . ."

In declaring the foregoing provisions of the Act as being violative of the Bill of Rights the court said:

> "It seems too clear for discussion further, that the gravamen of the offense thus created is the use of language of such nature as that in case it is uttered in the presence of a citizen of our country it would likely cause a breach of the peace, and that the terms of said section are so framed as to penalize one who utters language of such nature, *whether or not same be used under circumstances or in such presence as to make same reasonably provocative of a breach of the peace.*"

In light of the foregoing authorities, and particularly in light of the case last above cited by the Texas Court of Criminal Appeals, let us examine the provisions of Section 2 of House Bill No. 239. Said section requires the registration of designated persons, groups, etc., in any of three stated contingencies as follows:

1. If the advocacy of racial integration or segregation constitutes a principal function or activity; or

2. If such activities *cause* or *tend to cause* racial conflicts or violence; or

3. If such persons, firms, etc., are engaged, or engages, in raising or expending funds for employment of counsel or payment of costs in connection with litigation in behalf of racial *integration color.*

It is readily apparent that the first two contingencies, requiring registration are not limited to such advocacy or activities as are reasonably calculated to provoke a breach of the peace but apply to *advocacy* which was merely a principal function or activity and such activities as *caused or tended to cause* racial conflicts or violence. The Bill as so written is not limited to such advocacy or activities which are reasonably calculated to create the alleged evils which the Bill seeks to correct or prevent and hence, it cannot be supported under the police powers of the State. It is not necessary for us to decide whether the provision could be so revised as to render same constitutional in all its provisions. American Federation of Labor v. Mann, 188 S.W.2d 276.

The provision of Section 2, which provides that those "who or which is engaged or engages in raising or expending funds for the employment of counsel or payment of costs in connection with litigation in behalf of *racial integration color*" poses a somewhat different question. The courts have displayed a more lenient attitude toward those statutes which require registration by persons, firms or organizations who or which undertake the public collection of funds or securing subscriptions. Reasonable registration or identification in such cases is generally permitted. Communist Party of U. S. v. Subversive Act. Con. Bd., 223 F.2d 531; Thomas v. Collins, 323 U. S. 516. Apart from the vagueness and uncertainty of the luanguage used in said provision, it is our view that same could not be sustained upon the basis of being a *reasonable* requirement inasmuch as it applies with equal effect to funds *expended* as well as funds *collected.* Hence, it would restrict individuals and others named in the expenditure of purely personal or private funds for a lawful purpose. As to whether the provision is reasonable and can be sustained in other respects we do not here decide.

In the interest of brevity we do not undertake

a discussion of other legal questions which arise in connection with the Bill.

You are, therefore, advised that in our opinion, House Bill No. 239, for reasons stated, violates both our State and Federal Constitutions and hence is unconstitutional.

SUMMARY

House Bill 239, violates freedom of speech and freedom of press as guaranteed by both our State and Federal Constitutions and hence is unconstitutional.

APPROVED:
OPINION COMMITTEE
James N. Ludlum, Chairman
Robert O. Smith
John H. Minton
W. V. Geppert
J. C. Davis, Jr.

REVIEWED FOR ATTORNEY GENERAL
By George P. Blackburn

Yours very truly,
WILL WILSON
Attorney General of Texas
By S/Leonard Passmore
Assistant

REFERENCE

FEDERAL JUDICIAL POWER

A Study of Limitations—II: The Eleventh Amendment

This is the second of a series of studies outlined in the April, 1957, issue of *Race Relations Law Reporter*. The first study, "The Exhaustion of Administrative Remedies" appears in that issue (2 Race Rel. L. Rep. 561).

1. Theoretical Basis of the Amendment.

The principle that the sovereign cannot be sued without its consent is of ancient origin, and, for centuries, the doctrine has been sanctioned without question. However, the reasons given in justification of this principle have varied with the times and have often been conflicting. Alexander Hamilton, in *Federalist No. 81*, alluded to the fact that the various state governments enjoyed this sovereign immunity. He stated that the reason for the rule was the impracticability of enforcing a judgment against the sovereign. Article III, Sec. 2 of the Constitution, which reads: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made . . . to Controversies between two or more States;—between a State and Citizens of another State. . ." had caused some people to fear that, under this last provision, "an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities." In answer, Hamilton said:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

Mr. Justice Holmes, in *Kawananakoa v. Polybank*, 205 U.S. 349, 27 S.Ct. 526, 51 L.Ed. 834 (1907), expressed a somewhat different view. In that case, plaintiff mortgagees brought foreclosure proceedings against the defendant mortgagors. After the execution of the mortgage, the mortgagors had conveyed part of the mortgaged land to one Damon who had conveyed it to the "sovereign" Territory of Hawaii. The defendants asked dismissal of the action, contending that, since the territory could not be made a party defendant, all the necessary parties were not before the court. The court, holding that the plaintiffs were not thus prevented from foreclosing on the land not conveyed to the territory, made the following statement concerning sovereign immunity:

> ". . . Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26,2). A sovereign is exempt from suit, not because of any formal conception

or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." 205 U.S. at 353.

2. The Historical Setting in Which the Amendment was Passed.

The issue of whether Article III, Sec. 2 of the Constitution destroyed the immunity of a state from suit in the federal courts was presented in sharp focus in 1793 in the case of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793). The facts of the case do not appear in the official report, but in 1 Warren, *The Supreme Court in United States History*, page 93, note 1 (1923), there is a quotation from a contemporary newspaper which states the facts as follows:

> "A citizen of Georgia had left America prior to the Revolution and removed to Great Britain, after settling a partnership account with two partners in trade whose bonds he took for the balance due. After his decease, his executors (who were citizens of South Carolina) on making application for payment found that these two persons who had given their joint bonds had been inimical to the cause of liberty in the United States and that their property was confiscated. The executors, alleging that the bond was given previous to the Revolution, applied to the State of Georgia for relief."

The executors brought an original action in the United States Supreme Court, the cause of action being assumpsit. Process was served on the Governor and Attorney General, respectively, of Georgia. Counsel for plaintiffs then moved:

> "That unless the State of Georgia, shall, after reasonable previous notice of this motion, cause an appearance to be entered, in behalf of said State . . . or shall then shew cause to the contrary, judgment shall be entered against the said State, and a writ of enquiry of damages shall be awarded."

The motion was granted, but Georgia filed a written remonstrance and declined to present an argument. Nevertheless upon conclusion of the plaintiff's argument, the Court gave judgment for plaintiff in a 4-1 decision. Each justice delivered a separate opinion. Each relied to a great extent on the literal language of Article III, Sec. 2. The opinion of Chief Justice Jay is illustrative:

> "The question now before us renders it necessary to pay particular attention to that part of the 2d section, which extends the judicial power *'to controversies between a State and citizens of another State.'* It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a State may be *Plaintiff*. The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.
>
> ". . . If the Constitution really meant to extend these powers only to those controversies in which a State might be *Plaintiff*, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; . . . not even an intimation of such intention appears in any part of the Constitution." 2 U.S. at 476.

The adverse public reaction to this decision is set out in 1 Warren, *The Supreme Court in United States History*, at pp. 91 ff. The result was the Eleventh Amendment to the Constitution, which was proposed to the legislatures of the states by the Third Congress in 1794 and was declared in a message from the President to Congress, January 8, 1798, to have been ratified by the legislatures of three-fourths of the states. U.S.C.A., Constitution, Amend 11. The amendment reads:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

3. Suits by a Citizen Against His Own State.

The amendment, from its passage to the present day, has been an important factor in many aspects of litigation in the federal courts. The court decided in 1890 that, although the amendment reads ". . . any suit . . . against one of the United States by Citizens of another State . . .," it also prohibits a suit by a citizen in federal court against his own state asserting rights arising under federal law. *Hans v. State of*

Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). That case was an action by a citizen of Louisiana against the state of Louisiana, brought in a federal court located within the state. Process was served on the state governor. The suit was brought to recover interest due on state bonds. The Louisiana Legislature had, in 1874, in order to consolidate the state debt, authorized the issue of bonds, which were to be exchanged for bonds outstanding. The legislature also passed a revenue act, the proceeds of which were to be used to fund the new bonds. However, in 1879 a new constitution was adopted expressly repudiating the act of 1874.

Plaintiff, holder of some of the bonds, sued for the interest which had accrued January 1, 1880. The Supreme Court of the United States, Bradley, J., held for the state, saying:

> "In the present case the [plaintiff] contends that he, being a citizen of Louisiana, is not embarrassed by the obstacles of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State . . ." 134 U.S. at p. 10.
>
> ". . . [But] can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face." 134 U.S. at 15.

This case remains, to the present day, the controlling decision on the point.

Before the Eleventh Amendment was a quarter of a century old the Supreme Court had to pass on the contention that the amendment prevented review by the Court of a criminal conviction in a state court. In the famous case of *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-412, 5 L.Ed. 257 (1821), this contention was rejected. The Supreme Court held that the prosecution of a writ of error to review the judgment of the state court did not commence or prosecute a suit against the state but simply continued one begun by the state.

4. Suits in Which the State is a Party in the Record.

One of the earliest cases dealing with the amendment was *Osborn v. the President, Directors, and Company of the Bank of the United States*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824). The Ohio legislature in 1819 had passed an act specifically levying a tax on the Bank of the United States doing business in Ohio. The act further provided that, if the bank refused to pay the tax, the state auditor was empowered to enter any office of the bank and seize the amount of money or property necessary to pay the tax.

An action was filed in the name of the president, directors, and company of the bank, in the circuit court for the district of Ohio to enjoin execution of the act. Process was served on Osborn, the state auditor, and the court granted the injunction. However, in violation of the injunction, Osborn entered the office of the bank in Chilicothe and seized $100,000 in currency and notes. The bank then amended its bill, asking that Osborn be ordered to return the $100,000. The court gave judgment for the bank, and the United States Supreme Court affirmed. Marshall, C.J., delivering the opinion of the court, made the following statement in answer to the defendants' contention that the suit was prohibited by the Eleventh Amendment.

> ". . . It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the Eleventh Amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record." 22 U.S. at 857.

Marshall, therefore, held that the action was not one against the state of Ohio.

This language, however, was soon repudiated. *The Governor of Georgia v. Juan Madrazo*, 26 U.S. (1 Pet.) 110, 7 L.Ed. 73 (1828) involved a

contest over the ownership of some slaves which had been illegally brought into the United States. Madrazo had captured the slaves in Africa, but a pirate subsequently stole them from him. One Bowen later bought them, and when he transported them into the United States they were seized by a United States customs official and turned over to the state of Georgia. Madrazo, Bowen, and the Governor of Georgia subsequently filed claims in the federal court in Georgia, alleging ownership of the slaves. The court gave judgment for Madrazo against Bowen and the Governor, but the Supreme Court of the United States ruled that the action was barred by the Eleventh Amendment since the slaves were in the possession of the state of Georgia. Ruling on this issue, Marshall said:

> ". . . [W]here the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant." 26 U.S. at 123.

On the other hand it is held that counties and municipalities are subject to suit in the federal courts. *Lincoln County v. Luning*, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890). Government corporations of the state are not made immune from suit by the amendment. *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 31 S.Ct. 654, 55 L.Ed. 890 (1911).

5. Suits Against a State for Breach of Contract.

It has long been settled that there is no remedy against a state for breach of contract, unless the state has specifically consented to suit or to redress in some form. This doctrine has been reiterated many times in actions brought by holders of state bonds for principal or for accrued interest.

Illustrative is the case of *In re Ayers*, 123 U.S. 443, 8 S.Ct. 164, 31 L.Ed. 216 (1887). The Virginia legislature, in 1871 and 1879, had authorized the issue of over $4,000,000 in bonds and had provided that the coupons on these bonds could be surrendered by holders in payment of state taxes. However, many tax collectors later refused to accept the coupons as payment. Then, in 1887, the legislature, as a means of partially repudiating the bonds, approved this action by providing that the coupons would be received as valid tender only if the holder produced the bond with the coupon, and required the attorney general, auditors, and municipality treasurers to sue all taxpayers who had tendered detached coupons. A British subject who had purchased a large quantity of the coupons, brought an action in federal court to enjoin the attorney general, auditor, and local treasurers from starting such suits. The trial court granted the injunction, but the attorney general disobeyed the injunction and was subsequently imprisoned for contempt. The United States Supreme Court granted habeas corpus and ordered the attorney general's release. The court also ruled that the suit was barred by the Eleventh Amendment and therefore should be dismissed. In the course of the opinion, Matthews, J., speaking for the majority, stated:

> ". . . For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself. This results from the 11th Amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other States or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against the State by name, it is admitted could not be brought. . . .
>
> ". . . a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State . . . and is still, in substance, though not in form, a suit against the State." 123 U.S. at 502, 503.

The Court continued:

> "It cannot be doubted that the 11th Amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach,

> in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. . . . That obligation, by virtue of the provision of Article 1, § 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the 11th Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion." 123 U.S. at 504, 505.

A general review of contract cases will also be found in *Monaco v. Mississippi*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934).

Not only does the amendment prevent a suit in the federal courts on the bonds of a state by an individual but the state of the holder's residence cannot sue as assignee to recover for the holder. *New Hampshire v. Louisiana*, 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883). The holding of *In re Ayers* that the federal courts would not compel, indirectly, specific performance by a state through an injunction against state officials should be compared with *Georgia Railroad & Banking Co. v. Redwine, infra.*

6. Unconstitutional Action By State Officials.

The courts have made a definite distinction between actions against a state for breach of contract and actions to restrain a state officer from invading rights guaranteed to plaintiff by the Constitution. The leading case on this subject is *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). That case presented the following situation. The Minnesota legislature passed a statute lowering railroad passenger and freight rates and fixed severe penalties for any violation. Consequently, the stockholders of the Northern Pacific Railroad brought an action in federal court, naming the Minnesota attorney general and the railroad company defendants, to enjoin the attorney general from enforcing the act. The injunction was granted, but the attorney general refused to comply and began a suit in a state court to enforce the act. The attorney general, held in contempt of court, petitioned the United States Supreme Court for writ of habeas corpus. The court dismissed the petition. The petitioner contended that the action was, in effect, against the state of Minnesota and therefore prohibited by the Eleventh Amendment. The court, Peckham, J., rejected petitioner's contention. The court said:

> ". . . individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

At page 454, the court continued:

> "The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The court found the Minnesota statute to be in violation of the equal protection clause of the Fourteenth Amendment, and, therefore, rejected the petition for habeas corpus. (In accord: *Board of Liquidation v. McComb*, 92 U.S. 531, 541, 23 L.Ed. 623, 628 (1876)). The relationship of the decision in *Ex parte Young* to the requirement for a three-judge federal court in certain instances is discussed at 1 Race Rel. L. Rep. 811 (1956).

Ex parte Young has remained a landmark case. It was expressly followed by the United States Supreme Court as recently as 1952 in the case of *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335 (1952). The plaintiff company in 1833 had received a special charter of incorporation from the state of Georgia, in which plaintiff was exempted from taxation. In 1945, an amendment was added to the Georgia constitution, the amendment declaring: "All exemptions from taxation heretofore granted in corporate charters are declared henceforth null and void." In reliance on this amendment, Redwine, the state revenue commissioner, threatened to take action against the plaintiff company to collect taxes for the year 1939 and for all subsequent years. The company filed an action in the federal district court to enjoin the state commission from proceeding to collect the taxes, contending that the threatened action would deprive plaintiff of rights guaranteed by Article I Section 10 of the Constitution which reads: "No State shall . . . pass any . . . Law impairing the obligation of contracts. . . ." The district court ruled that the action was barred by the Eleventh Amendment. The Supreme Court of the United States, Vinson, C. J., reversed, specifically rejecting the ruling of the district court.

> "The District Court characterized appellant's action as one to enforce an alleged contract with the State of Georgia, and, as such, a suit against the State. But appellant's complaint is not framed as a suit for specific performance. It seeks to enjoin appellee from collecting taxes in violation of appellant's rights under the Federal Constitution. This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State. These decisions were reexamined and reaffirmed in *Ex parte Young*, 209 U.S. 123 (1908), and have been consistently followed to the present day. This general rule has been applied in suits against individuals threatening to enforce allegedly unconstitutional taxation, including cases where, as here, it is alleged that taxation would impair the obligation of contract." [Citing cases] 342 U.S. at 304, 305.
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> ". . . Since appellant seeks to enjoin appellee from a threatened and allegedly unconstitutional invasion of its property, we hold that this action against appellee as an individual is not barred as an unconsented suit against the State. The State is free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers without constitutional authority." 342 U.S. at 305, 306.

7. Other Wrongful Conduct by State Officials.

As noted above, the courts make a distinction between contract actions against a state and actions to prohibit state officers from invading a right guaranteed to plaintiff by the Constitution. Likewise, the courts also distinguish actions against state officials for tort or for other kinds of wrongful conduct. In the case of *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 31 S.Ct. 654, 55 L.Ed. 890 (1911), the defendant, a state-owned college, by its trustees built a dike across the river from plaintiff's land in order to protect the college from overflow. The use of convicts in the construction was authorized by a South Carolina statute. However, the dike caused plaintiff's land to be flooded, and a large amount of fertile soil was washed away. Plaintiff brought suit in a state court of South Carolina for damages. The trial court ruled that title to the land on which the dike was built was in the state and that the college was a public agent which could not be sued without the state's consent. Assigning error plaintiff invoked the Fourteenth Amendment but the judgment was affirmed by the Supreme Court of South Carolina. On appeal to the United States Supreme Court, Mr. Justice Lamar said:

> ". . . [I]mmunity from suit is a high attribute of sovereignty,—a prerogative of the state itself,—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. . ." 221 U.S. at 642, 643.

The Court accordingly held that the suit was not a suit against the state and reversed the judgment of the Supreme Court of South Carolina. Accord: *Poindexter v. Greenhaw*, 114 U.S. 270, 291, 5 S.Ct. 903, 962, 29 L.Ed. 185, 193 (1885).—especially see 114 U.S. at 287, 288.

A similar case is *Johnson v. Lankford*, 245 U.S. 541, 38 S.Ct. 203, 62 L.Ed. 460 (1918), a suit by a bank depositor against the Bank Commissioner of Oklahoma. An Oklahoma bank under the supervision of the defendant Commissioner had issued plaintiff a certificate of deposit. The bank subsequently became insolvent. Plaintiff then brought an action in Federal court, alleging that the defendant Commissioner had failed adequately to supervise the business of the insolvent bank, both before and after its failure, and had thereby caused plaintiff's loss. The trial court ruled that the action was one against the state of Oklahoma and that it was therefore barred by the Eleventh Amendment. Judgment was entered for the defendant. The United States Supreme Court reversed, holding that the action was not against the state but against the defendant Lankford as an individual. Justice McKenna said:

> ". . . It will be observed that the basis of the action is the neglect of duty of Lankford as bank commissioner, by which plaintiff has been damaged to the amount of his certificate of deposit. . ." 243 U.S. at 544.
>
> "There is certainly no assertion of state action or liability upon the part of the state, and no relief is prayed against it. The charges are all against Lankford. The relief sought is against him because of his willful or negligent disregard of the laws of the state, and it is because of this his surety is charged with liability, it having guaranteed its fidelity." 245 U.S. at 545.

The court stated that, to hold the action one against the state

> ". . . would be to assert, we think, that whatever an officer does, even in contravention of the laws of the state, is state action, identifies him with it and makes the redress sought against him a claim against the state and therefore prohibited by the Eleventh Amendment. Surely an officer of a state may be delinquent without involving the state in delinquency, indeed, may injure the state by delinquency as well as some resident of the state, and be amenable to both." 245 U.S. at 545.

8. Suits to Compel State Officers to Act.

An interesting question is presented when a state statute outlines the duties of a state officer, and the plaintiff, contending that the officer has not performed those duties, brings a suit to force the official to act. Two defenses, among others, are usually asserted. First, the official asserts that the statute has given him an area of discretion which the plaintiff cannot invade. This is a question of administrative law and not within the scope of this article. The second defense usually made is that the action is against the state and therefore barred by the Eleventh Amendment.

Lankford v. Platte Iron Works, 235 U.S. 461, 35 S.Ct. 173, 59 L.Ed. 316 (1915) involved an action in which the latter defense was raised. Oklahoma had passed a statute requiring the state banking board to levy an assessment against each state bank in order to establish a depositors' guaranty fund. The statute further provided that, if at any time the fund should be insufficient for the purpose of liquidating the deposits of insolvent banks, "the banking board shall have authority to issue certificates of indebtedness to be known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' in order to liquidate the deposits." 235 U.S. at 471.

The plaintiff was a depositor in a bank which failed, but the defendant Bank Commissioners refused to make any payment to plaintiff. Plaintiff thereupon brought suit in Federal court asking that the defendants be ordered to comply with the terms of the statute and pay plaintiff the amount of his loss from the fund, or, if the fund be insufficient, to issue certificates of indebtedness in accordance with the statute.

The trial court gave judgment for plaintiff and defendants appealed to the United States Supreme Court. In this Court the defendants contended that the action was one against the state of Oklahoma and therefore barred by the Eleventh Amendment. The Court framed the specific question for decision in these words:

> "Whether the State should commit it [the fund] to the mere ministerial administration of the Bank Commissioner and Banking Board, and subject them to controversies with depositors or draw around them the

> circle of its immunity, was a matter within its competency to determine, and we are brought to the question of interpretation—which has the State done?" 235 U.S. at 470.

The Court answered the question by ruling, first, that title to the fund was in the state of Oklahoma. Then the court reasoned that, this being true, a suit to compel officers to administer the fund was a suit against the state and therefore barred by the Eleventh Amendment. The court came very close to clothing the officers with total immunity, for the court said:

> "The fund . . . does not take its administration from the officers of the State, or subject them to judicial control. We cannot assume that it will not be faithfully managed and applied." 235 U.S. at 475.

9. Consent To Be Sued.

The Eleventh Amendment had the effect of prohibiting any suit against a state without its consent except when brought by the United States or another state. See *Monaco v. Mississippi*, 292 U.S. 313, 328, 332, 54 S.Ct. 745, 78 L.Ed. 1282 (1934). A corollary is that a state may consent to suit in the federal courts, *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 531, 56 S.Ct. 892, 80 L.Ed. 1309 (1936), *Kennecott Copper Corp. v. State Tax Com'n*, 327 U.S. 573, 577, 66 S.Ct. 745, 90 L.Ed. 862 (1946), or may waive immunity by its appearance in a court of the United States and voluntary submission to the court's jurisdiction, *Clark v. Barnard*, 108 U.S. 436, 2 S.Ct. 878, 27 L.Ed. 780 (1883).

10. Race Relations Cases—Suits Against Public School Officials.

In several cases against public school officials, in which plaintiff has alleged racial discrimination in deprivation of rights guaranteed by the Fourteenth Amendment, the defense of the Eleventh Amendment has been raised. In each case, the defense was rejected. In *Whitmyer v. Lincoln Parish School Board*, 75 F.Supp. 686 (W.D. La. 1948), the plaintiff, a Negro schoolteacher, brought an action against the school board for Lincoln Parish and its superintendent, alleging salary discrimination because of race, asking for a declaratory judgment that such action was unconstitutional and an injunction. The defendants moved to dismiss, for the reason, inter alia, that the action was a suit against the State of Louisiana and therefore barred by the Eleventh Amendment. The Court rejected this contention but did not discuss the point. Judgment was given for plaintiff.

In *Cook et al. v. Davis*, 178 F.2d 595 (5th Cir. 1949), a Negro teacher in a colored high school in Atlanta sued the Atlanta Board of Education and Superintendent of Schools, alleging salary discrimination, asking a declaratory judgment that the alleged action violated plaintiff's rights under the Fourteenth Amendment, and asking an injunction. In answer to the defense that the action was against the state of Georgia and therefore prohibited by the Eleventh Amendment, the court said:

> "The suit is not against the State of Georgia in name or in effect. Nothing is sought to be recovered against the State, nor is any right of the State sought to be impaired. The validity of its statutes is not even impugned. It seeks only to have public funds which have been duly appropriated rightly paid out by administrative officers according to law. The Eleventh Amendment as interpreted in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842, does not apply." 178 F.2d at 599.

However, the court reversed the decision on the grounds that plaintiffs had failed to exhaust their administrative remedies and remanded the case to the lower court.

Louisiana has invoked the requirement of consent by amending its constitution to declare that certain named commissions, boards, and municipal corporations shall be considered special agencies of the state and to expressly withdraw the consent of the State of Louisiana to legal proceedings against any of the listed agencies. 1 Race Rel. L. Rep. 776 (1956).

Along similar lines the Virginia General Assembly adopted Chapter 68 of the Acts of the 1956 Extra-Session which contains the following section (See 1 Race Rel. L. Rep. 1103 (1956)):

> "§ 13. Every action authorized and taken in conformity with the provisions of this act shall be and is hereby declared to be the act of General Assembly of Virginia and an act of the Governor of Virginia and an act

taken on behalf of the sovereign Commonwealth of Virginia, and if any suit, action or other legal proceedings be instituted relative thereto, the same shall be regarded and is hereby declared to be a suit, action or proceeding against the Commonwealth of Virginia, and the Commonwealth hereby declines and refuses for the Commonwealth of Virginia or the Governor of Virginia to be subject to such a suit unless it shall be one brought by the Attorney General of Virginia to enforce the laws of the Commonwealth.

In *School Board of Charlottesville v. Allen*, 240 F.2d 59, 2 Race Rel. L. Rep. 59 (4th Cir. 1956), actions to enjoin local school boards and superintendents from enforcing racial segregation were held not to be suits against a state within the meaning of the Eleventh Amendment, the court saying:

"A suit for such relief is not a suit against a state within the meaning of the 11th amendment to the Constitution but is a suit for the protection of individual rights under the Constitution by enjoining state officers and agencies from taking action beyond the scope of their legal powers.

"The difference between using the injunctive power of the court to direct the exercise of discretion by a state officer and using it to enjoin the violation by him of constitutional rights under the authority of his office was pointed out nearly a half a century ago in *Ex parte Young* . . . .

"It is argued that the doctrine thus laid down must be confined to individuals and may not be applied to corporate agencies of the state such as school boards. We see no ground for such a distinction. If high officials of the state and of the Federal Government (See Philadelphia Co. v. Stimson, supra) may be restrained and enjoined from unconstitutional action, we see no reason why a school board should be exempt from such suit merely because it has been given corporate powers. A state can act only through agents; and whether the agent be an individual officer or a corporate agency, it ceases to represent the state when it attempts to use state power in violation of the Constitution and may be enjoined from such unconstitutional action.

"While no such question was raised in the cases heard by the Supreme Court in Brown v. Board of Education, 347 U.S. 483 and 349 U.S. 294, the question was inherent in the record in those cases; and it is not reasonable to suppose that the Supreme Court would have directed injunctive relief against school boards acting as state agencies, if no such relief could be granted because of the provisions of the Eleventh Amendment to the Constitution."

The problem is also dealt with in the opinion of Circuit Judge Tuttle, in the case of *Orleans Parish School Board v. Bush*, 2 Race Rel. L. Rep. 308, decided by the Fifth Circuit Court of Appeals on March 1, 1957. *Cert. denied*, _____ U.S._____ 25 L.W. 3374 (1957). The opinion states:

"It would seem hardly worth our considering this contention in light of the fact that all of the School Segregation Cases were actions of the same type as the one before us (suits against a state official or board operating under State authority) were it not for the fact that both the appellant and the Attorney General of the State urge it so strongly upon us. The burden of their argument is that this is a suit to compel state action, which under a long line of cases, including Great Northern Life Insurance Company v. Reed, 322 U.S. 47, and Ford Motor Company v. Treasury Department, 323 U.S. 459, falls within the prohibition whether nominally against the State or against state officials. But this suit does not seek to compel state action. It seeks to prevent action by state officials which they are taking because of the requirements of a state constitution and laws challenged by the plaintiffs as being in violation of their rights under the Federal Constitution. If in fact the laws under which the board here purports to act are invalid, then the board is acting without authority from the State and the State is in nowise involved. That a federal court can entertain a suit where such a situation is alleged has long been recognized. . . .

". . . .

"There is no merit in the claim of appellant that the court was without jurisdiction to try this case as being a suit against the state. The substance of this suit is that the

school board is unconstitutionally forcing them to attend schools that are segregated according to race and their prayer is that the board be enjoined from continuing to do so. If plaintiffs are right in their contention, then they can obtain complete relief from this defendant, because any sanctions compelling it to continue its illegal conduct falls when the Court determines that such sanctions are illegal."

CUMULATIVE TABLE OF CASES

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IN THIS LISTING the official style of each case and its citations, if any, appear in *italic* type. The reverse citations are in Roman type.


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